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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

701 PHARMACY CORP., WILLEN PHARMACY, INC., MAGNAM PHARMACY, INC., FAMILY PHARMACY, INC., 1491 DEKALB PHARMACY, INC., 96 CENT GOODS AND DRUGS, INC., LASID SALES, INC., ISHAM BROADWAY PHARMACY, INC., MRB PHARMACY, INC., SULTAN PHARMACY, INC., LAWRENCE DRUGS, INC., 67 EASY BURNSIDE PHARMACY, RITEWAY DRUGS, INC., ASIM DRUGS, INC.,

Petitioners,

vs.

CAESAR A. PERALES, Commissioner of the New York State Department of Social Services,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a provider has a constitutionally protected property interest in the expectation of continued participation in the medicaid program which the regulatory scheme give the state the right to terminate without cause?

2. Whether a provider charged with stigmatizing violations of law, but terminated without cause has a constitutionally protected liberty interest in the expectation of continued participation in the medicaid program?

3. Whether the equal protection clause is violated by a state regulation which affords a pre-termination hearing to a medicaid provider terminated for cause, but not to a provider charged with stigmatizing violations of law, who is terminated without cause?

PARTIES

The parties are set forth in the caption herein. There are no corporate affiliations.

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OPINIONS BELOW

The transcript of the proceedings and oral opinion of the United States District Court, Southern District of New York, is set forth in the Appendix (hereinafter "app.") at p. 17-a.

The opinion of the United States Court of Appeals, Second Circuit, reported at No. 90-7648, slip. op. at 3389 (2d Cir. April 5, 1991), is set forth in the app. p. 1-a.

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals, Second Circuit, sought to be reversed was entered April 5, 1991.

There has been no order respecting a rehearing or granting an extension of time within which to file this petition.

Jurisdiction to review the decision of the United States Court of Appeals, Second Circuit is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the effect of the regulations of the New York State Medicaid Program upon the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, which provides:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV § 1.

The medicaid program is a joint federal and state program designed to provide medical care to the indigent, the authority for which is found at 42 U.S.C. § 1396 et. seq. The respondent is the Commissioner of the Department of Social Services (hereinafter the "Department") which is the "single state agency" designated under 42 U.S.C. § 1396

a(a)(5) to administer the New York State Medical Assistance Program (hereinafter "medicaid"), and empowered under N.Y. Soc. Serv. L. §§ 363-a(1) & (2) to adopt regulations governing the medicaid program.

Each appellant was charged with violating the law and the regulations of the Social Services Department the Department of Health and Department Education, and terminated without cause and without a hearing. Each of the charges constituted "unacceptable practices," under 18 NYCRR § 515.2, which provides, in part, as follows:

> 515.2 Unacceptable practices under the medical assistance program.
> (a) General. An unacceptable practice is conduct by a person which is contrary to:
>
> (1) the official rules and regulations of the department;...
>
> (3) the official rules and regulations of the Departments of Health, Education and Mental Hygiene...
>
> (b) Conduct included. An unacceptable practice is conduct which constitutes fraud or abuse and includes the practices

> specifically enumerated in this subdivision.

18 NYCRR § 515.1(b)(1):

> Abuse means practices that are inconsistent with sound fiscal, business, medical or professional practices and which result in unnecessary costs to the medical assistance program, payments for services which were not medically necessary, or payments for services which fail to meet recognized standards for health care.

The enumerated practices are set forth in full at app. p. 70-a. 18 NYCRR § 504.7(a), which became effective January 5, 1987, allows for termination of a provider without cause and without a hearing.

> 504.7 Continued enrollment termination. (a) A provider's participation in the program may be terminated by either the provider or the department upon 30 days' written notice to the other without cause.

Appellants were not terminated under 18 NYCRR § 504.7(b) which provides for termination with cause after a pre-termination hearing.

> (b) A provider's participation in the program may be terminated,

> suspended, or restricted for a reasonable period of time if the department finds that the provider has engaged in an unacceptable practice as set forth in Part 515 of this Title. A provider whose participation is so terminated suspended or restricted is entitled to notice and an opportunity to be heard in accordance with Part 515 of this Title.

18 NYCRR § 515.7 provides for immediate sanctions, including termination, where a crime is involved or there is danger to the public health or welfare. (app. p. 68-a).

STATEMENT

The appellants are licensed pharmacies located within poor neighborhoods whose residents rely substantially upon medicaid for their health care needs. Appellants and other pharmacies in the area derive 85 to 95 percent of their income from services provided to medicaid recipients; all have all been licensed at their present locations for many years and have never "been the subject or focus of any governmental inquiry or

proceeding." In the Spring of 1991, the Department, as part of an effort to curb the medicaid budget, notified each appellant that it was being terminated from the medicaid program within 30 days, saying:

> Therefore, we are exercising our option under 18 NYCRR § 504.7(a) to discontinue our relationship with you. Our reasons are set forth in the enclosed document.

The "document" was a "Summary of Factors" each of which stated, "As the result of an on-site inspection of this pharmacy...the following violations were observed and noted." A typical Summary of Factors for appellant Family Pharmacy, Inc. is set forth at app. p. 75-a. No appellant was notified that their terminations were "without cause." Although none of the appellants were explicitly advised of its tie-in to the regulations, all of the violations charged to the appellants are "unacceptable practices" under 18 NYCRR § 515.2 and constitute an "abuse" under 18

NYCRR § 515.1(b)(1); and, therefore, are grounds for termination under § 504.7(b) which provides, in pertinent part:

> A provider's participation in the program may be terminated...if the department finds that the provider has engaged in an unacceptable practice as set forth in Part 15 of this Title.

When queried by the District Court, the Department's attorney made it absolutely clear that appellants were terminated for serious violations of a stigmatizing nature.

> The reasons are not frivolous for terminating these people. These are serious violations. I am not talking just about steps or the configuration a pharmacy. The business with these defendant -- many of these cases -- I have defended many of these cases and all these cases have common elements: Frequent common violations, mislabeling, the repack logs. <u>These are serious violations impinging upon the public health, safety and welfare</u>. (Emphasis added.) (app. p. 60-a).

If appellant had been terminated for unacceptable practices they would have been "entitled to notice and an opportunity to be heard in accordance with Part 515 of this

Title." 18 NYCRR § 504.7(b). No pre-termination hearings were provided "in accordance with Part 515," and appellants were not given any other minimum due process proceeding, such as a § 504.7(b) conference at which the Department presents proof in support of its charges and the provider is given the opportunity to submit evidence to refute the charges.

The specific serious substantive reasons for terminating the appellants, all of whom were charged with violating the Social Services Law, the Health Law and the Education Law, and for practices "which fail to meet recognized standards for health care" a component of the definition of abuse in 18 NYCRR § 515.1(b)(1) are summarized herein.

Willen Pharmacy, Inc.: terminated three months after it was approved for renewal for violations which "can compromise the safety and purity of medications, and conduct which can lead to "patients losing their 'freedom

of choice' and to collusion between the pharmacy and Medical center"; Magnam Pharmacy, Inc.: placing a "patient at risk" and unsanitary conditions which "can have a definite impact upon the safety and purity of medications"; Family Pharmacy, Inc.: placing "patients' safety at risk"; "patients' health in jeopardy"; and, compromising the "safety and purity of...drugs"; 1491 DeKalb Pharmacy, Inc.: approved in December 1988 and terminated April 26, 1990 for failure to report changes in its facility; maintaining an illegal link between its pharmacy and a medical center; and, failing to adequately provide for the handicapped; 96 Cent Goods and Drugs, Inc.: approved for medicaid status in August 1989, and terminated as a result of an on-sight inspection on March 15, 1990; "should have exercised due professional care by closely scrutinizing and verifying these prescriptions [from Dr. Ekinci] as opposed to merely dispensing these

potentially harmful combination of drugs" ; Lasid Sales, Inc.: causing "potential harm to the patient", "exhibiting poor judgment" and, "poor control"; 67 East Burnside Pharmacy: "no assurance that the medication is safe" and placing the "patient at risk" ; Riteway Drugs, Inc.: filing false claims for unfurnished medical supplies in violation of 18 NYCRR § 515.2(b)(1)(a) -- a specified "fraud," "abuse" and "unacceptable practice"; Asim Drugs, Inc.: placing the "safety and welfare of the patients in jeopardy"; 701 Pharmacy Corp.: "potential harm to the patient," being "inconsistent with providing quality care," having "sanitary conditions [that]...were appalling" and not being able to show the "disposition of controlled drugs"; Isham Broadway Pharmacy, Inc.: "placing the client at risk of receiving a dangerous or less than effective drug" and "mislabelling"; MRB Pharmacy Inc.: posing "a threat to the health of our recipients,"

"misbranding" and improper identification of drugs; Sultan Pharmacy, Inc.: creating "a potential danger to the health and safety of the client" making it "impossible for the aged, disabled and otherwise handicapped patients to obtain pharmacy services," creating "potentially life threatening to a client"; deplorable sanitary conditions and compromising "the safety and purity of medications...in a potentially harmful circumstance for the client"; Lawrence Drugs, Inc.: "unsigned prescriptions," "improper monitoring of drugs" and ignoring official notices.

The finding of the District Court was that the Department's charges would be called to the public's attention.

> But beyond that, I think I can almost take judicial notice that each one of these pharmacies is located in an economically deprived area. Almost every one of these pharmacies, judging by their affidavits submitted by the pharmacies, are located in areas in which the overwhelming majority of their business is from medicaid

> recipients and it doesn't take much imagination to conclude that to terminate their medicaid provider status would effectively put them out of business and if everybody in the community in which they do business is then notified that we are no longer eligible to service your medicaid prescriptions, how much more public notice of disqualification would be needed to affect the persons who are being terminated. (app. p. 35-a).

Each appellant was terminated pursuant to § 504.7(a) without "notice and an opportunity to be heard in accordance with Part 515...." but without being notified that termination was "without cause." Part 515 provides a procedural scheme designed to afford providers with a due process pre-termination hearing unless the provider is involved in the commission of a crime or there is an immediate danger to the health or welfare of the public, for which immediate sanctions are available under 18 NYCRR § 515.7.

Although each appellant was charged with an unacceptable practice under 18 NYCRR

§ 515.2 and, according to the Department, with other stigmatizing "serious violations impinging upon the public health, safety and welfare," (app. p. 60-a), the Department deliberately elected not to terminate appellants for cause under § 504.7(b); nor did it seek immediate relief under 18 NYCRR § 515.7 on the ground of immediate danger to the public. Instead, the Department chose to terminate appellants without cause under § 504.7(a), thereby stripping them of their due process right to a hearing -- pre- or post-termination -- and relegating appellants to judicial review of the Department's administrative determination under Article 78 of the N.Y. CPLR § 7801 et. seq.

An Article 78 proceeding rarely involves a hearing or an opportunity to be heard, and limits the court to the question whether there was substantial evidence for the administrative determination. In fact, the Court of Appeals below conceded that "a

provider's termination is subject to judicial review, albeit limited to the issue of malicious intent, under Article 78 of the CPLR." (app. p. 7-a).

After being terminated without the benefit of a hearing, each appellant commenced a separate action in the United States District Court, Southern District of New York alleging violations of 42 U.S.C. § 1983 and seeking an order enjoining termination until they were provided with a hearing. Jurisdiction in each case was invoked under 28 U.S.C. § 1343 (a)(3) and 42 U.S.C. § 1983.

Each appellant, relying upon 12 U.S.C. § 1983, claimed deprivation of their "rights, privileges and immunities secured by the Constitution and laws of the United States" and such rights "that are secured to it by the equal protection and due process clauses of the 14th Amendment to the United States Constitution."

The District Court, per Honorable Judge I. Leo Glasser, enjoined appellants' termination without a hearing, basing his determination on equal protection grounds and dismissing the due process claims. (app. pp. 25-a-26-a).

> THE COURT: The determination which I am making is predicated entirely upon equal protection, not due process.
>
> All right. So why don't you submit an order enjoining the defendant permanently from proceeding under 504.7 (A) and not giving the plaintiffs an opportunity to be heard as they would have if they were terminated under 504.7 (B), because I find that there is no rational basis to be served, no rational basis for any State interest to be served, by proceeding under one subdivision as opposed to the other and the reasons are entirely arbitrary and capricious.
>
> The State hasn't shown one reason which I believe to have any merit for deciding to proceed under one subdivision as opposed to another. It would appear to be an entirely arbitrary and capricious process.
>
> The other points [sic] which is made by the State in their briefs is that it's just not true

> that persons terminated under 504.7(A) have no opportunity to challenge it. (app. pp. 44-a-45-a).

The District Court recognized that the appellants had the right to judicial review of the administrative determination but rejected that procedure as a valid constitutional alternative to a pre-termination hearing.

> They have, they say, an Article 78 proceeding. That doesn't obviate, in my view, a denial of equal protection.
>
> I don't see any reason why denying 504.7 (A), the same administrative review process that 504.7 (B) people have, is any lesser a denial of equal protection because somebody may have some other remedy to go to a State Court and start a judicial proceeding rather than have some administrative hearing which they can, thereafter, contest in a State Court.
>
> Why should 504.7 (B), that class, have two bites at an apple and the 504.7 (A) class only one. Why do the 504.7(B) have an administrative bite and a judicial bite, whereas the 504.7 (A), we are told, can go the State Court in an Article 78 proceeding, the rational

basis for that. (app. pp. 45-a-46-a).

Although the Department contended that "all of the unacceptable practices under 504.7(b) go to fraud or abuse of the medicaid system," the Court found that to be untrue; that 18 NYCRR § 515.2 includes many other non-fraud or abuse charges, all of which are unacceptable practices, and which should be the subject of termination under § 504.7(b). (app. p. 39-a).

Appellants respectfully contend that the District Court finding that the equal protection clause was implicated by the use of a § 504.7(a) termination under circumstances where the unacceptable practice charges should have been dealt with under § 504.7(b), is an implicit finding that the appellants were either: (1) terminated for cause, which required a pre-termination hearing; or, (2) although terminated without cause, were entitled to a pre-termination

hearing because of the serious, stigmatizing nature of the charges which would eventually be made public. Appellants' position is that in either event, the charges were of such serious quality as to create a "liberty" interest, which required the application of due process considerations.

Whether the terminations were officially labelled "our option under 18 NYCRR § 504.7 (a) to discontinue our relationship," or "for cause" under § 504.7 (b) is a distinction without a difference and irrelevant to the issue whether a liberty interest was present because: appellants were terminated for cause; the charges were "serious violations impinging upon the public health, safety and welfare;" (app. p. 60-a) and the charges would be made public. (app. p. 35-a). It is the substance and not the form, which this Court endeavors to protect through the constitutional safeguards of the Fourteenth Amendment; a liberty interest arises where

the substantive raison d'etre for termination is "cause" - irrespective of the form of the termination letter mailed to the appellants.

The danger in permitting due process rights to be extinguished by administrative slight-of-hand must be corrected by this Court, otherwise we will be at the mercy of administrators undeterred by due process mechanisms. This Court is urged to review this matter to make clear that a state may not take liberties with the Fourteenth Amendment by charging a provider with "X" and terminating for "Y."

The Court of Appeals, in a rare departure from its own previous rulings concluded in this case and in Kelly Kare, Ltd. v. O'Rourke, No. 90-9107, slip. op. 3445 (2d Cir. April 5, 1991), decided the same day, that there was no property interest; and, that no liberty interest was implicated because appellants were terminated without cause:

> Although we conclude today in Kelly Kare, Ltd. v. O'Rourke, No. 90-9107, slip op. at 16 (2d Cir. Apr. 5, 1991), that providers have no property interest in continued participation in the Medicaid program, to determine the validity of the Department's rationale, we necessarily would have to determine whether termination 'for cause' under § 504.7(b) implicates a liberty interest protected by the due process clause, a question we expressly left unanswered in Kelly Kare. See id. at 18 n. 4. We decline to reach this intriguing constitutional issue to determine the validity of the regulatory scheme under the equal protection clause because the Department has proffered other rationales that are sufficient to defeat the pharmacies' challenge. (app. p. 9-a).

With respect to the equal protection claim, the court said:

> We conclude, however, that the Department's regulations satisfy the rational basis test inasmuch as they represent a measured response to the State's obligation to provide quality health care to the indigent and conserve public funds, while simultaneously affording enhanced procedural protection only to providers charged with fraud and abuse. The pharmacies' equal protection challenge, accordingly, must fail. (app. pp. 15-a-16-a).

The conclusion that only those "charged

with fraud and abuse" are entitled to a pre-termination hearing misses the point: the appellants have been "charged with fraud and abuse" but it was camouflaged by a § 504.7(a) label without even a statement that the dismissals were without cause. More importantly, the charges against every appellant fit squarely within the definition of "abuse" which is defined at 18 NYCRR § 515.1(b)(i).

POINT I

A PROVIDER HAS A PROTECTED PROPERTY INTEREST IN THE EXPECTATION OF CONTINUED PARTICIPATION IN THE MEDICAID PROGRAM

The Court of Appeals ruled on the basis of its decision in Kelly Kare Ltd. v. O'Rourke, No. 1106., slip. op. at 3445 (2d Cir. Apr. 5, 1991), that a provider has no property interest in continued participation in the medicaid program:

> [B]ecause participation as a provider in the Medicaid program is not a protected property interest, the Department's failure to provide

> a pre-termination hearing under § 504.7(a) does not offend the due process clause of the fourteenth amendment. (app. p. 3-a).

(A) 28 U.S.C. Sup. Ct. Rule 10(1)(a).

Appellants' position is that substantially every court of appeals outside the Second Circuit and the Second Circuit itself before Kelly Kare, has found a "property" interest in continued medicaid participation which cannot be defeated without a pre-termination hearing under the due process clause of the Fourteenth Amendment.

Because the appellate court's decision "is in direct conflict with the decisions of other courts of appeals concerning the exact subject matter" this case meets one of the tests this Court applies when, considering a petition for a writ of certiorari. Ironically, two leading cases, Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975), and Patchogue Nursing Center v. Bowen, 523 F.2d 602 (2d Cir. 1986) cert. denied 479 U.S. 1030

(1987), were relied upon by the other circuits to sustain the proposition that medicaid providers possess a protected property interest.

In Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975), the question whether the appellant had "a property interest in her expectation of continued participation in the medicaid program" was squarely before the court, which said in reliance upon Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972):

> It is clear that Mrs. Case has a property interest in her expectation of continued participation in the Medicaid program. The procedural requirements of due process must reflect a balance between government's interest and the nature of the individual interest being affected by the governmental action.

523 F.2d at 606.

In Patchogue Nursing Center v. Bowen, 797 F.2d 1137 (2d Cir. 1986), the same court unabashedly confirmed that providers have a

property interest in the continued participation in the medicaid program, which required at least an informal hearing before being deprived that interest.

> Health care providers have a constitutionally protected property interest in continued participation in the Medicare and Medicaid programs, see e.g., Case v. Weinberger, supra, 523 F.2d at 606, and thus are entitled to some form of hearing before being finally deprived of that interest. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

797 F.2d at 1144-45.

In Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577 (2d Cir. 1989), decided after the creation of § 504.7(a), the Second Circuit fudged on the question whether there was a property interest in the medicaid program deserving of constitutional protection; but, in Plaza it clearly did not rule on the issue; "we need not decide here, however, whether or not the provider's interest is such a right." Id., at 582.

However, the court suggested that Patchogue may not be good law.

> In Patchogue Nursing Home v. Bowen, 797 F.2d 1137, 1144-45 (2d Cir. 1986), cert. denied, 479 U.S. 1030, 107 S.Ct. 873, 93 L.Ed.2d 828 (1987), we stated that a nursing home facility ousted from Medicaid participation did have a property right protected by due process; but since we went on to conclude that the facility had received due process, our statement as to the existence of a property right was in the nature of dictum....
>
> Thus, the combination of rights reserved by the State with regard to Medicaid providers, allowing DSS to terminate without cause on 30 days' notice or to terminate or suspend immediately in certain circumstances, casts doubt on whether the provider's interest in continuing as a provider, either in definitely or for any period without interruption, is a property right that is protected by due process.

Id., at 581-82.

In Kelly Kare v. O'Rourke, No. 90-9107, slip. op. 3445 (2d Cir. Apr. 5, 1991), the court confirmed that it had not resolved the issue in Plaza and, at the same time said that both Case and Patchogue were

indistinguishable from Kelly Kare and that its decision in the latter case was not "necessarily inconsistent."

> An examination of our earlier cases reveal that they are not necessarily inconsistent. Both Patchogue Nursing and Case involved situations totally dissimilar to the present one, in which the institutional providers, i.e., nursing homes, were facing suspension or removal of their federal certifications as qualified nursing homes. in Plaza Health, we focused on the structure of New York's regulatory scheme -- which was modified after the decisions in Patchogue Nursing and Case -- and opined that the State's retention of significant discretion in continuing a qualified provider's participation raised a doubt as to the existence of a property right in continued participation. Furthermore, in Plaza Health, we side-stepped the issue, because we determined that regardless of whether a property interest existed, sufficient process had been afforded to pass constitutional muster.

Kelly Kare at 3455.

Irrespective of the confusion in the Second Circuit, Kelly Kare and the instant case are at complete variance with the other circuits. The following decisions illustrate

that the difference between the Second Circuit and the other circuits coupled with the unclear mandate of the Second Circuit require review by this court.

In Doe v. Bowen, 682 F.Supp. 637, 641-42 (D. Mass. 1987), the District Court analyzing the decisions of the courts of appeals recognized that the First Circuit was in conflict with the Second, Third and Fourth circuits, which had held to the property interest theory.

> Case law in the First Circuit has not recognized any constitutional character to the claim for continued eligibility to reimbursement for Medicare and Medicaid services....
>
> Other circuits recently have been more hospitable to the claim that a physician or a provider has a protectable property interest. See, e.g., Patchogue Nursing Center v. Bowen, M.D., 797 F.2d 1137, 1144-45 (2d Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 873-74, 93 L.Ed.2d 928 (1987); Ram, M.D. v. Heckler, 792 F.2d 444, 447 (4th Cir. 1986); cf. Ritter, D.O. v. Cohen, 797 F.2d 119, 122 (3d Cir. 1986).
>
> However, the court in Doe went on to

conclude that previous First Circuit decisions were not cast in stone and speaking for that circuit in an unreversed decision the court found a property interest which places the First, Third and Fourth Circuits in conflict with the Second Circuit decision below.

> Given the recognition in other circuits of the property rights of a physician or provider in continued participation in medicare and medicaid programs and the more sophisticated analysis of property rights in the First Circuit since Cervoni, I am inclined to the view that the First Circuit may revisit the issue. In any event, I conclude for purposes of this memorandum that the existing rules and understandings regarding suspension or termination of a physician from the programs at issue here create some sort of property right for Dr. Doe subject to due process protection.

Id. at 642.

Ritter v. Cohen, 797 F.2d 119 (3d Cir. 1986), cited in Doe, is still the law in the Third Circuit and as suggested in Doe, the Fourth Circuit follows the majority of circuits in finding that "continued

participation in the medicaid program is a property interest protected by the due process clause." Ram v. Heckler, 797 F.2d 444, 447 (4th Cir. 1986).

Compare, Sommerset House, Inc. v. Turnock, 900 F.2d 1012, 1015 (7th Cir. 1990), where the court found a property interest because there was "an injury to reputation along with a change in legal status," an argument advanced by appellants to support both as liberty and property interest claim.

Similarly, in Hathoway v. Matthews, 546 F.2d 227, 230 (7th Cir. 1976), the Seventh Circuit, addressing the termination of medicaid provider, cited Case in reaching the conclusion that continuing medicaid benefits is a protected right. However, Case may no longer be the law as the Second Circuit appears to have distinguished that case into oblivion.

> The Second Circuit has recently reached the identical conclusion with respect to the termination of Medicaid payments to the proprietor

> of a nursing home. Case v. Weinberger, 523 F.2d 602,606 (2d Cir. 1975). See also Ross v. Wisconsin Dept. of Health & Social Services, 369 F.Supp. 570 (E.D.Wis. 1973)....

Id. at 230.

The decision below is also in apparent conflict with a decision in the Ninth Circuit which, in Cassim v. Bowen, 824 F.2d 791, 796 (9th Cir. 1987), also referred to Case v. Weinberger.

> We assume, arguendo, that Cassim has implicated either a property right or a liberty interest. On similar facts, the Fourth Circuit has held that a doctor possesses a property right in continued participation in the Medicaid program. See Ram, 792 F. 2d at 447. The Tenth Circuit, on the other hand, while refusing to find a property right, has found a liberty interest. Koerpel, 797 F.2d at 863-66. See also Case v. Weinberger, 523 F.2d 602, 606 (2d Cir. 1975) (operators of nursing home have a property interest)....

It is obvious from the foregoing that by refusing to find a due process property interest right to continued medicaid participation because the termination was

"without cause," the Second Circuit is now in conflict with the foregoing circuits.

Because this issue will assume more importance as the economy declines, it is imperative that this Court resolve the conflict between the Second Circuit and the other circuits which are united in their collective opinions, by laying down guidelines for circuits as to whether a provider has a protectable property right without any conditions or when he is charged with cause but terminated without cause.

This Court can take judicial notice that the Governor of the State of New York has directed the Department to pare $800 million from the budget for the coming fiscal year. The decision before this Court, unless reversed, will give the Department the unfettered right to terminate any and all providers without cause, in its quest to comply with the goal set for it by the State. Unfortunately, as in most cases, the burden

falls on the shoulders of the poor; those who depend on medicaid for their health needs. More importantly, unless terminated by this Court, the administrator's arbitrary terminations will extend beyond medicaid and medicare to the other social services until all welfare programs are administratively reduced in times of economic decline when the recipients most need the assistance.

(B) 28 U.S.C. Sup. Ct. Rule 10(1)(a).

The foregoing decisions establish that the First, Third, Fourth and Seventh Circuits have found at least a property interest where there is a termination for cause, based in part upon the Second Circuit decisions in Case and Patchogue which may now have been eroded. However, whether the decision below is that no property interest exists irrespective of whether there is cause so long as the statutory right to terminate without cause exists, is difficult to ascertain because of the court's failure to

qualify its holding. The court said that the failure to provide a pre-termination hearing was not fatal "because participation as a provider in the medicaid program is not a protected property interest and because termination without cause does not implicate a liberty interest..." (Emphasis added).

The court did not say "because termination without cause does not implicate a property interest." Taken literally, the court has done away with Case and Patchogue and has placed itself on the opposite side of the named circuits. Moreover, in Kelly Kare the court refused to find a property interest even though the appropriate section of law prescribed specific "for cause" reasons for termination. In rather tortuous language the court tried to explain away the "for cause" requirement and seems to conclude that no property interest exists -- at all.

> There is a critical difference between being declared a qualified health-care provider and being awarded a contract to furnish

> health-care services. The refusal by a social services district to enter a contract with a qualified provider in no way affects the status of the provider. Such a disappointed provider remains free to seek a contract with a different social services district. Furthermore, the wording of section 364(2)(b) belies Kelly Kare's claim that it has a right to participate in the program. The statute specifically focuses on a provider's status as qualified; continuous participation is not addressed.

The question that the Court of Appeals said "we need not and do not reach "appears elusive and seems not to have been addressed in the instant case, leaving the Second Circuit at odds with the named circuits and, more importantly, leaving open a unique and important question which this Court must answer:

Does a protected property interest exist where the statutory scheme "rests in the state significant discretion over the continued conferral of that benefit," Kelly Kare at 3454 and, if not, does it exist side-by-side with a liberty interest but free of

the "stigmatizing" rule requirement, where there is a termination for cause; or, as in the case in hand, where stigmatizing charges are leveled but the discharge is carried out silently without any more reference than the number of the section which provides the option to terminate?

It is respectfully submitted that the question unanswered of the Second Circuit is so unique and is such an "important question of federal law which has not been, but should be, settled by this Court. 28 U.S.C. Sup. Ct. Rule 10(1)(c).

(C) 28 U.S.C. Sup. Ct. Rule 10(1)(c).

A further reason why this Court should grant this petition, is that the appellate court's decision also "conflicts with applicable decisions of this Court." 28 U.S.C. Sup. Ct. Rule 10(1)(c).

In Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 98 S.Ct. 2701 (1972), this Court laid out broad principles of law

defining the nature of constitutionally protected property and liberty interests, which have been followed consistently by this Court and the circuits.

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms.
>
> Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg v. Kelly, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011. See Flemming v. Nestor, 363 US 603, 611, 4 L Ed 2d 1435, 1444, 80 S Ct 1367.

Id., at 576-77, 33 L.Ed.2d at 560-561, 98 S.Ct. at ___. See also Matthews v. Eldridge, 424 U.S. 320, 96 S.Ct. 893 (1976).

In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539, 84 L.Ed.2d 494 (1985), 105 S.Ct. 1487, 1491, this Court confirmed the presence of a property interest where the statute allowed termination only for cause.

In Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L.Ed.2d 265 102 S.Ct. 1148, (1982), the Illinois Fair Employment Practices Act required the filing of a complaint and the convening by the Commission of a fact-finding hearing within 120 days After unlawful termination. Claimants who failed to file on time lost their right to pursue the claim. The appellant who claimed he was terminated because of a handicap filed his claim on time. However, the Commission through inadvertence, failed to convene a fact-finding conference at which the merits of the charge and evidence would be considered. The appellant, whose claim was extinguished, claimed that his due process and equal protection rights were implicated.

With respect to the due process issue, this Court, citing its decision in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), said a property interest existed.

In any event, the view that Logans FEPA claim is a constitutionally protected one follows logically from the Court's more recent cases analyzing the nature of a property interest, The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' [Citations omitted]. Memphis Light, Gas & Water Div. v. Craft, 436 US 1, 11-12, 56 L Ed 2d 30, 98 S Ct 1554 (1978(); Gross v. Lopez, 419 US 565, 573-574, 42 L Ed 2d 725, 95 S Ct 729 (1975); Board of Regents v. Roth, 408 US 564, 576-578, 33 L Ed 2d 548, 92 S Ct 2701 (1972). Once that characteristic is found, the types of interest protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.' National Mutual Insurance Co. v. Tidewater Transfer Co. 337 US 582, 646, 93 L Ed 1556, 69 S Ct 1173 (1949) (Frankfurter, J., dissenting); Arnett v. Kennedy, 416 US 134, 207-208, and n 2, 40 L Ed 2d 15, 94 S Ct 1633 (1974) (Marshall, J., dissenting); Board of Regents v. Roth, 408 US, at 571-572, 576-577, 33 L Ed 2d 548, 92 S Ct 2701. See, e.g., Barry v. Barachi, 443 US 55, 61 L Ed 2d 365, 99 S Ct 2642 (1979) (horse trainer's license protected); Memphis Light, Gas & Water Div. v. Craft, supra (utility service); Mathews v. Eldridge, 424 US 319, (1976) (disability benefits); Goss v Lopez, supra (high school education); Connell v.

Higginbotham, 403 US 207, 29 L Ed 2d 418, 91 S Ct 1772 (1971) (government employment); Bell v Burson, 402 US 535, 29 L Ed 2d 90, 91 S Ct 1586 (1971)(driver's license); Goldberg v. Kelly, 397 US 254 25 L Ed 2d 287, 90 S Ct 1011 (1970) (welfare benefits).

It is respectfully submitted that the decision of the court of appeals below is in direct conflict with Logan.

That there is confusion in the Second Circuit as to the effect of Roth and its progeny, including Logan, is apparent from the language of the Second Circuit in Patchogue Nursing Center v. Bowen, 797 F.2d 1137, 1144-1145 (2d Cir. 1986), cert. denied, 479 U.S. 1030, 107 S. Ct. 873, 93 L.Ed.2d 828 (1987), and Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577 (2d Cir. 1989).

In Patchogue, the Second Circuit unabashedly found a property interest in the continued expectation of participation in the medicaid program, which required at least an informal hearing. Although there may not be direct precedential value in this Court's

denial of certiorari in Patchogue, it is certainly of some assistance in determining whether the decision herein conflicts with Roth and the cases which flow from it.

It is respectfully submitted that whether a statute permits a "without cause" termination should not be, and is not, dispositive of the issue, especially where, as here, it is transparent that the termination was "for cause." The Department did not suddenly decide, without reason, that the appellants should not be providers, without reason. Nor were they simply terminated in a general economy move. Rather, the appellants were terminated for cause, because they did too much medicaid business, viz, 85 to 95 percent of their business. In fact, they were never advised they were terminated without cause.

This Court as asked now step into the conflict and decide whether Roth and this Court's cases which flow from it hold that

there is a due process property interest in the medicaid program irrespective of the method of termination; otherwise, the lower courts will be deluged by litigation on a case by case basis as to whether a no cause termination was an arbitrary and capricious method of avoiding the hearing process. Moreover, if left unchecked agency administrators will enjoy dictatorial roles, terminating providers here and there as it suits their whims.

POINT II

THERE IS A PROTECTIBLE LIBERTY INTEREST IN THE EXPECTATION OF CONTINUED PARTICIPATION IN THE MEDICAID PROGRAM

The Court of Appeals said that "because termination without cause does not implicate a liberty interest, the Department's failure to provide a pre-termination hearing under § 504.7(a), does not offend the due process clause of the fourteenth amendment." (app. p. 3-a).

(A) 28 U.S.C. Sup. Ct. Rule 10(1)(a).

The Second Circuit's refusal to recognize a liberty interest under the instant circumstances where the Department circumvented a termination for serious violations of law by simply notifying the appellants "we are exercising our option under 18 NYCRR § 504.7(a) to discontinue our relationship with you," puts the decision "in conflict with the decision of other "United States Court of Appeals on the same matter...." 28 U.S.C. Sup. Ct. Rule 10(1)(a).

The admission of the Department that there are serious violations impinging upon the public health, safety and welfare, coupled with the factual finding of the District Court that there would be "public notice of disqualification," created a liberty interest under the rulings by the First, Seventh and Tenth Circuits.

The appellate court has now said that

appellants' liberty interest is dissolved merely because they were officially terminated under a discretionary section i.e., § 504.7(a). The test, however, is not whether the discharge is labelled "without cause"; it is whether there is a "termination or suspension coupled with a stigmatizing public statement of government claims." Doe v. Bowen, 682 F.Supp. 637 (D. Mass. 1987).

In Koerpel v. Heckler, 797 F.2d 858, 865 (10th Cir. 1986), the Tenth Circuit rejected the claim to a property interest, but found a liberty interest under the general principles of Board of Regents v. Roth.

> Dr. Koerpel has also asserted a liberty interest, in that his good name, reputation, honesty, and integrity are jeopardized because due process was denied him. Board of Regents v. Roth, supra. Reputational damage alone, no matter how egregious, is sufficient to support a claim of liberty deprivation. McGhee v. Draper, 639 F.2d 639, 643 (10th Cir. 1981) (citing Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)). Some other tangible interest such as employment must also be involved. Id. Dr. Koerpel

> realizes 85% of his income from Medicare reimbursement and if he is found to be ineligible, a major source of his livelihood will be discontinued. Also, his hospital staff privileges may be threatened. Clearly more than his reputation is at risk.
>
> Unlike our analysis of the merits of Dr. Koerpel's claimed property interest, there are no cases in the Tenth Circuit which have explored a protected liberty interest in a context similar to that of the instant case. There are, however, cases which deal with the elements of an infringed liberty interest for 42 U.S.C. § 1983 purposes. See, e.g., Eames v. City of Logan, Utah, 762 F.2d 83 (10th Cir. 1985) and Lentsch v. Marshall, 741 F.2d 301 (10th Cir. 1984). These cases explain the existence of a three-prong test -- publication of false information which is stigmatizing -- which must be satisfied before a liberty interest is implicated. Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985) and Asbill v. Housing Authority of Choctaw Nation, 726 F.2d 1499, 1503 (10th Cir. 1984).

Thus, the Tenth Circuit found a liberty interest in the exact set of circumstances as the case before this Court. The same result was reached by the Seventh Circuit, in Sommerset House, Inc. v. Turnock, 900 F.2d 1012 (7th Cir. 1990).

In Doe v. Bowen, 682 F.Supp. 637, 642-643 (D.Mass. 1987), the District Court tracked the liberty interest decisions in other circuits, including the Seventh.

> There is an alternative constitutional interest which case law has recognized as worthy of due process protection for physicians facing suspension: an interest in what should perhaps most accurately be described as 'occupational liberty.' Colaizzi v. Walker, 812 F.2d 304, 307 (7th Cir. 1987). This liberty interest has found its clearest articulation in public employment cases but it appears to fit comfortably as a description of the interest implicated when a physician is terminated or suspended on the basis of a 'conviction' from the programs the Secretary administers. The elements of a claim of deprivation of an occupational liability interest are termination or suspension coupled with a stigmatizing public statement of government claims....
>
> Although the First Circuit has not addressed the issue of an 'occupational liberty interest' in this context, it has been recognized recently in the case law. The Tenth Circuit in Koerpel, after declining to find a property interest for the physician, nevertheless held the liberty interest 'sufficiently colorable to obtain the jurisdiction of the

federal court.' 797 F.2d at 866.

The Seventh Circuit also concluded in Hathoway v. Matthews, 546 F.2d 227, 230 (7th Cir. 1976), that continuing medicaid benefits is a protected right.

> The Second Circuit has recently reached the identical conclusion with respect to the termination of Medicaid payments to the proprietor of a nursing home. Case v. Weinberger, 523 F.2d 602, 606 (2d Cir. 1975). See also, Ross v. Wisconsin Dept. of Health & Social Services, 369 F.Supp. 570 (E.D.Wis. 1973)....

The appellate courts ruling that there was no liberty interest, although all of the "stigmatizing" elements were present, because the terminations were made by the Department under its § 504.7(a) option power, i.e., without cause ("termination without cause does not implicate a liberty interest." (app. p. 3-a)), places the Second Circuit in conflict with the First, Seventh and Tenth circuits. Obviously, medicaid providers within the Second Circuit are not being accorded the same degree of social justice as

those outside the Circuit. The State cannot by waving its magical wand around those providers whom it terminates for cause turn the discharge into something routine. The administrative actions unless reviewed, makes a charade of the termination process and due process rights.

(B) 28 U.S.C. Sup. Ct. Rule 10(1)(c).

The decision of the court below also puts the Second Circuit's decision in conflict with Board of Regents v. Roth, and other cases decided by this Court.

In Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972), this Court announced the principles of law relating to both "property" and "liberty" interests.

> 'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts...purposely left to gather meaning from experience...[T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'
> National Ins. Co. v. Tidewater Co.
> 337 US 582, 646, 93 L Ed 1556,

> 1596, 69 S Ct 1173 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.

Id., at 571-572, 33 L.Ed.2d 557-558.

In Wisconsin v. Constantino, 400 U.S. 440, 91 S.Ct. 507 (1971), where the plaintiff was not afforded a hearing to refute a public notice accusing her of "excessive drinking," this Court described the constitutional requirements of due process.

> '[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (Frankfurter, J., concurring)....

Id. at 436-437, 91 S.Ct. at 510.

It is respectfully submitted that the decision of the court of appeals during appellants' claim to liberty interest is in conflict with the decision of this court.

POINT III

THE FAILURE TO PROVIDE A PRE-TERMINATION HEARING VIOLATES APPELLANTS EQUAL PROTECTION RIGHTS

It was appellants contention that the failure to provide them with the same pre-termination proceedings available to providers notified of their termination for cause was irrational and, therefore, violated their equal protection rights. The District Court agreed, although no evidence was admitted at the argument on the motion for an injunction, the Department made representations and advanced reasons for the disparate treatment of providers which the District Court rejected including (app. pp. 24-a to 42-a), the Department's claim that

providers terminated under § 504.7(b) were given hearing because "all of the unacceptable practices under 504.7(b) go to fraud or abuse of the medicaid system."

Although there was no evidentiary hearing and 18 NYCRR § 515.2(b) includes as an unacceptable practices "conduct which constitutes fraud or abuse and includes the practices specifically enumerated in this subdivision," the Court of Appeals said there was a rational basis for the difference in the classes finding a difference in the degree of culpability between § 504.7(a) and 504.7(b); that appellants failed to offer proof that they had been charged with "unacceptable practices"; and, "according to the plain meaning of the regulations and the Department's unrebutted evidence" a 504.7(b) violator must commit "egregious" conduct before termination. (app. p. 13-a.)

Equal protection claimants who are not subject to a higher level of scrutiny bear a

heavy burden of showing there is no rational basis for disparate treatment between persons of the same class. Thus, appellants agree with the applicability of the much cited language of Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 942-43 (1979):

> Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Appellants claim, however, that it is totally irrationally and "unrelated to the achievement of any combination of legitimate purposes" to provide a pre-termination hearing for provider who is terminated under § 504.7(b), and fail to give a pre-termination hearing to appellants who were terminated for unacceptable practices but notified they were terminated under § 504.7(a) without any reference to the words "without cause."

28 U.S.C. Sup. Ct. Rule 10(a)(c).

It is respectfully submitted that the decision below which found a rational basis for the disparate treatment is in directed conflict with legions of cases decided by this Court but none more apparent then Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), which is directly on point and sustains appellants' contention that the regulations, as applied to appellants is totally irrational.

In that case the majority of this Court considered it unnecessary to address appellant's equal protection claim having passed favorably on his due process claim. However, Justice Blackmun, joined by Justices Brennan, Marshall and O'Connor, considered "the equal protection issue as sufficiently important to require comment," Id. at 437, 71 L.Ed.2d at 279, 102 S.Ct. at ___, and noted that "a majority of the Members of the Court are favorably inclined toward the claim...."

Id. at 438-39, 71 L.Ed.2d at 280.102 S.Ct. at

—.

> Here, of course, the FEPA may operate to terminate meritorious claims without any hearing at all, while allowing frivolous complaints to proceed through the entire administrative and judicial review process. While it may well be true that '[n]o bright line divides the merely foolish from the arbitrary law,' Schweiker v. Wilson, 450 US, at 243, 67 L Ed 2d 186, 101 S Ct 1074 (dissenting opinion), I have no doubt that Section 858(b) is patently irrational in light of its stated purposes.

Id. at 440, 71 L.Ed.2d at 281.102 S.Ct. at _

Similarly, the Department's policy of affording a pre-termination hearing only to those whom it deigns to style as wrongdoers regardless of whether they are wrongdoers is potentially irrational in light of the stated purpose in its regulations.

In Logan, it was said:

> This Court still has an obligation to view the classificatory system, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary. Rinaldi v. Yeager, 384 US, at 308, 16 L Ed 2d 577, 86 S Ct 1497 ('The Equal Protection Clause requires

> more of a state law than non-discriminatory application within the class it establishes')...

Id., at 441, 102 S.Ct. at ___, 71 L.Ed.2d at 282.

"The question is whether this unusual classification is rationally related to a state interest that would justify it." Id. at 443, 71 L.Ed.2d at 283, 102 S.Ct. at ___. Here the answer must be "no." The Department's stated purpose behind Section 515.1 is to eliminate those providers who engage in fraudulent practices and commit abuses including the enumerated unacceptable practices. (app. p. 70-a). However, providers who have allegedly engaged in such unacceptable practices may be terminated either with, or without, cause; a determination left solely to the arbitrary discretion, and indeed whim, of the Department. If the Department wants to avoid the time or the expense of a hearing, it simply refers to the option to terminate

section viz § 504.7(a) without even suggesting that the termination is with cause or without cause, effectively precluding the provider from being heard. The provider is left without recourse, and in most instances, as in the case at hand, without a means of employment. Clearly, the Department may achieve the same end, and fulfill its stated purpose, by terminating the provider with cause. The effect on the provider, however, can be devastating. As stated in Logan, what the Department has most successfully achieved is to create "two discreet groups that are accorded radically disparate treatment," Id., at 438, 71 L.Ed.2d at 280, 102 S.Ct. at ____, with no rational purpose.

It is respectfully submitted that the decision of the court of appeals holding that the regulatory scheme herein is rationally related to a state object to be achieved is in conflict with Logan.

CONCLUSION

Appellants submit that this petition for a writ of certiorari brings before this Court substantial questions for review, all of which require plenary consideration with briefs on the merits and oral argument for their resolution

Dated: Queens, New York
May 23, 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 775, 776, 777, 778, 779, 780,
781, 782—August Term, 1990

(Argued: January 30, 1991 Decided: April 5, 1991)

Docket Nos. 90-7648, 90-7650, 90-7656, 90-7658,
90-7808, 90-7830, 90-7842, 90-7844

701 PHARMACY CORP., WILLEN PHARMACY, INC., MAGNAM PHARMACY, INC., FAMILY PHARMACY, INC., 1491 DEKALB PHARMACY, INC., 96 CENT GOODS AND DRUGS, INC., LASID SALES, INC., ISHAM BROADWAY PHARMACY, INC., MRB PHARMACY, INC., SULTAN PHARMACY, INC., LAWRENCE DRUGS, INC., 67 EAST BURNSIDE PHARMACY, RITEWAY DRUGS, INC., ASIM DRUGS, INC.,

Plaintiffs-Appellees,

—v.—

CESAR A. PERALES, Commissioner of the New York State Department of Social Services,

Defendant-Appellant.

Before:

KEARSE, PRATT and MCLAUGHLIN,
Circuit Judges.

Appeals from judgments entered in the United States District Court for the Eastern District of New York (I. Leo Glasser, *District Judge*), permanently enjoining the Commissioner of the New York State Department of Social Services from terminating certain Medicaid providers in the absence of an administrative hearing because the failure to provide a pre-termination hearing violates the equal protection clause of the fourteenth amendment. Reversed.

LAWRENCE S. KAHN, Deputy Solicitor General (Robert J. Schack, Andrea M.A. Osborne, Assistant Attorneys General, Robert Abrams, Attorney General of the State of New York), *for Defendant-Appellant.*

JEROME I. SAGER, New York, New York (Laurie Lombardo, Lee-Lee Chang, Wise Lerman & Katz, P.C., New York, New York, of counsel), *for Plaintiffs-Appellees* Isham Broadway Pharmacy, Inc., 67 East Burnside Pharmacy, Riteway Drugs, Inc., and Asim Drugs, Inc.

ROBERT PURZAK, Garden City, New York (Jacobson & Goldberg, Garden City, New York, of counsel), *for Plaintiffs-Appellees* 701 Pharmacy Corp., Willen Pharmacy, Inc., Magnam Pharmacy, Inc., Family Pharmacy, Inc., 1491 DeKalb Pharmacy, Inc., 96 Cent Goods and Drugs, Inc., Lasid Sales, Inc., MRB

Pharmacy, Inc., Sultan Pharmacy, Inc., and Lawrence Drugs, Inc.

MCLAUGHLIN, *Circuit Judge*:

Effective January 5, 1987, the New York State Department of Social Services (the "Department") promulgated new regulations permitting it to terminate, without cause, the participation of a provider of benefits under the State Medicaid program. *See* 18 N.Y.C.R.R. § 504.7(a). Until 1987, the Department terminated providers only for cause. *See* 18 N.Y.C.R.R. Part 515. Because termination for cause involves allegations of fraud or abuse, *see id.*, the Department affords providers threatened with a Part 515 termination a pretermination hearing. *See* 18 N.Y.C.R.R. § 504.7(b). Providers terminated without cause under § 504.7(a), however, are not given a hearing.

We have held today in *Kelly Kare, Ltd. v. O'Rourke*, No. 90-9107, slip op. (2d Cir. Apr. 5, 1991), that because participation as a provider in the Medicaid program is not a protected property interest and because termination without cause does not implicate a liberty interest, the Department's failure to provide a pretermination hearing under § 504.7(a) does not offend the due process clause of the fourteenth amendment. We are now asked to determine whether the Department's practice of affording a hearing before it terminates a provider for cause (pursuant to § 504.7(b)), but not affording a hearing before it terminates a provider without cause (pursuant to § 504.7(a)), violates the equal protection clause of the fourteenth amendment. We con-

clude that it does not and reverse the judgment of the district court.

BACKGROUND

Plaintiffs-appellees are pharmacies licensed by the State of New York and enrolled in New York's Medicaid program. Between December 1989 and May 1990, each pharmacy was subjected to an onsite inspection by the Department. The inspectors concluded that certain conditions in the pharmacies violated Department regulations concerning, *inter alia*, cleanliness, accessibility to the handicapped, and the handling of and accounting for controlled substances.

A short time later, each pharmacy was notified that the Department was terminating the pharmacy's participation in the Medicaid program "without cause" pursuant to § 504.7(a). The notices were accompanied by a "Summary of Factors," listing the Department's reasons for termination. The "Summary of Factors" enumerated the violations found during the Department's earlier inspection. Termination was effective thirty days from the date of the termination letter.

The pharmacies commenced separate actions alleging violations of 42 U.S.C. § 1983, and sought orders enjoining the Department from terminating their participation in the Medicaid program until it provided them with pre-termination hearings. Following hearings, which were consolidated with the merits of the actions pursuant to Fed. R. Civ. P. 65(a)(2), the district court (I. Leo Glasser, *District Judge*) held that, although the absence of a pre-termination hearing did not violate the pharmacies' due process rights, it did run afoul of the equal protection clause of the fourteenth amendment.

The district court permanently enjoined the Department from terminating the pharmacies' participation as Medicaid providers under § 504.7(a) without first providing a hearing. This appeal followed.

DISCUSSION

I. THE REGULATORY SCHEME

Medicaid is a joint federal and state program designed to provide medical care to the indigent. *See* 42 U.S.C. § 1396 *et seq*. Under New York's Medicaid program, the Department is the "single state agency", 42 U.S.C. § 1396a(a)(5), empowered to adopt regulations governing the program. *See* N.Y. Soc. Serv. L. §§ 363-a(1) & (2). The Department's regulations are promulgated in 18 N.Y.C.R.R. Part 500.

Under the state regulations, private and public medical personnel whose applications for enrollment are accepted by the Department agree to abide by all Department regulations. *See* 18 N.Y.C.R.R. § 504.3. New York Medicaid providers are not issued a license, certificate or permit that confers any right to continued participation in the Medicaid program. Indeed, New York courts have characterized the relationship between the State and the provider as "contractual in nature." *Ray Pharmacy, Inc. v. Perales*, 564 N.Y.S.2d 767 (1st Dep't 1991); *Bora v. New York State Department of Social Services*, 152 A.D.2d 10, 13, 547 N.Y.S.2d 956, 958 (3rd Dep't 1989).

Under the 1987 amendments to the regulations, the Department may terminate a provider's participation in the Medicaid program in either of two ways. Under § 504.7(a), "[a] provider's participation in the program

may be terminated by either the provider or the department upon 30 days' written notice to the other without cause." 18 N.Y.C.R.R. § 504.7(a). This "without cause" termination does not afford the provider with a pre-termination hearing unless the Department also demands restitution or repayment of an overpayment. *See* 18 N.Y.C.R.R. §§ 518.5(a), 519.4(a)(2).

The other way to terminate a provider is pursuant to § 504.7(b), "if the department finds that the provider has engaged in an unacceptable practice as set forth in Part 515 of this Title." 18 N.Y.C.R.R. § 504.7(b). "An *unacceptable practice* is conduct which constitutes fraud or abuse" and includes specific practices such as submitting false claims, making false statements, conversion, soliciting or receiving bribes or kickbacks, unacceptable recordkeeping, employing a sanctioned person, receiving payments for services in addition to payment under the Medicaid program, deceiving clients or unlawful discrimination. 18 N.Y.C.R.R. § 515.2(b) (emphasis in original). With certain exceptions not relevant here, § 504.7(b) expressly affords a hearing to a provider terminated for engaging in unacceptable practices. *See* 18 N.Y.C.R.R. §§ 504.7(b). Termination under § 504.7(b) may carry in its wake censure or exclusion from the Medicaid program for a reasonable time, *see* 18 N.Y.C.R.R. § 515.3(a), and, pursuant to federal regulations, formal notice must be given to the public and the government of the exclusion. *See* 42 C.F.R. § 1002.206 (c).[1]

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1 Section 1002.206 provides:

After the review, if the agency makes a final decision to exclude—

. . .

Judicial review of the Department's termination decision pursuant to either provision is available under Article 78 of the New York Civil Practice Law & Rules. N.Y.C.P.L.R. Art. 7801 *et seq.*; *see, e.g., Ray Pharmacy*. Such a review, of course, is common. The practice, therefore, is for the Department to include a Summary of Factors with its termination letter. Even when the termination is without cause, the Department will be obligated to state its reasons for the termination to enable the Article 78 court to determine whether the decision was made in bad faith and therefore arbitrary and capricious. *See* N.Y.C.P.L.R. § 7803(3); *Karanja v. Perales*, 559 N.Y.S.2d 521, 522 (1st Dep't), *appeal denied*, 76 N.Y.2d 715, 565 N.Y.S.2d 766 (1990). Commendably, the Department has chosen to disclose its reasons earlier in anticipation of that challenge.

II. THE EQUAL PROTECTION CHALLENGE

The pharmacies challenge § 504.7(a) on the ground that the Department's failure to afford a pre-termination hearing for providers terminated thereunder, while giving such a hearing to providers terminated under § 504.7(b), violates the equal protection clause of the fourteenth amendment. The argument is that if

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(c) The agency must also give notice of the exclusion and the effective date to the [Office of Inspector General within the Department of Health and Human Services], [Health Care Financing Administration], the public, and, as appropriate, to—

(1) Recipients;

(2) [Utilization and Quality Control Peer Review Organizations];

(3) Providers and organizations;

(4) Medical societies and other professional organizations;

(5) State licensing boards and affected State and local agencies and organizations; and

(6) Medicare carriers and intermediaries.

42 C.F.R. § 1002.206(c) (1989).

those terminated under (b) get a hearing, so too must those terminated under (a).

Initially, we note that our review of this equal protection challenge is limited to the rational basis test. "Unless laws 'create suspect classifications or impinge upon constitutionally protected rights', it need only be shown that they bear 'some rational relationship to a legitimate state purpose.' " *City of Dallas v. Stanglin*, 490 U.S. 19, 23, 109 S. Ct. 1591, 1594 (1989) (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40, 93 S. Ct. 1278, 1300 (1973)); *Fetterusso v. New York*, 898 F.2d 322, 325 (2d Cir. 1990). Under the rational basis test, the regulatory scheme of New York's Medicaid program is "presumed to be valid," *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985); and the distinction it draws between terminations under § 504.7(a) and § 504.7(b) does not contravene the equal protection clause "simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 340 (1911)). To sustain their constitutional attack, the pharmacies must demonstrate that the Department's classifications are not rationally related to any legitimate state objective. *See Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 2083 (1981); *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S. Ct. 1074, 1080-81 (1981).

The Department advances several bases upon which to justify the regulatory distinction challenged here. The first justification for the classification is the presence or

absence of a due process interest. The Department claims that it affords a pre-termination hearing only under § 504.7(b) because such terminations may implicate an interest protected by the due process clause. Although we conclude today in *Kelly Kare, Ltd. v. O'Rourke*, No. 90-9107, slip op. at 16 (2d Cir. Apr. 5, 1991), that providers have no property interest in continued participation in the Medicaid program, to determine the validity of the Department's rationale, we necessarily would have to determine whether termination "for cause" under § 504.7(b) implicates a liberty interest protected by the due process clause, a question we expressly left unanswered in *Kelly Kare*. *See id.* at 18 n. 4. We decline to reach this intriguing constitutional issue to determine the validity of the regulatory scheme under the equal protection clause because the Department has proffered other rationales that are sufficient to defeat the pharmacies' challenge.

The Department's regulations reflect a sensitivity to the practical implications of a termination for "unacceptable practices" under § 504.7(b). A Medicaid provider so terminated faces censure or exclusion from the program for a definite period of time, *see* 18 N.Y.C.R.R. § 515.3(a); and it cannot reapply for participation until the expiration of the period of exclusion. *See id.* § 515.9(a). Under federal law the Department must notify the government and the public of its decision to terminate a provider for fraud or abuse pursuant to § 504.7(b), *see* 42 C.F.R. § 1002.206(c), and such a terminated provider may also face exclusion from any part of the Medicare program. *See* 42 U.S.C. § 1320a-7(b)(5)(B). In addition, a provider terminated under § 504.7(b) is excluded from any involvement relating to providing medical care to Medicaid recipients. *See* 18

N.Y.C.R.R. § 515.5(c). Thus, the Department will not pay pharmacies for prescriptions written by a physician terminated under § 504.7(b), *see id.* § 515.5(b), and the Department will not pay providers who hire a provider excluded under § 504.7(b). *See id.* § 515.5(b). Indeed, any provider who hires a provider terminated under § 504.7(b) and submits a claim to the Department for the excluded provider's services, is itself subject to exclusion under § 504.7(b). *See id.* § 515.2(b)(7). None of these sanctions applies to a § 504.7(a) termination, and a provider terminated thereunder may reapply for participation at any time. *See* 18 N.Y.C.R.R. § 504.5(d).

The district court accepted the pharmacies' argument that these are distinctions without a difference. The pharmacies contend that, regardless of whether it is an (a) or (b) termination, the government and the public are necessarily "notified" of the termination because they are no longer able to provide services under the Medicaid program. They also complain that the ability to reapply at any time after termination is illusory because the Department would not terminate a provider one day and accept an application for reenrollment from the same provider on the next day. Although these arguments have a visceral appeal, the fact remains that providers terminated under § 504.7(b) are found to have engaged in fraudulent or abusive practices and are subject to grave collateral consequences, not the least of which is their complete exclusion from any activity relating to the Medicaid program for a definite period of time. The regulatory scheme of New York's Medicaid program in providing a hearing under § 504.7(b) is tailored to prevent the unwarranted imposition of these consequences, which do not ensue when a provider is terminated without cause.

There is nothing anomalous about treating rule violations in a manner proportionate to the violation and providing enhanced procedural protections to those charged with more serious infractions. When the Department determines that a Medicaid provider has violated its regulations in a manner rising to a level of fraud or abuse, it seeks to terminate that provider pursuant to § 504.7(b) and provides a hearing that is commensurate with the nature and consequences of the charge. When the Department seeks to terminate a provider for conduct that does not rise to a level of fraud or abuse—or for no reason at all—it terminates pursuant to § 504.7(a). As noted above, conduct resulting in a § 504.7(a) termination might typically include the failure to maintain sanitary conditions, provide access to the handicapped or properly handle and account for controlled substances.[2]

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2 The specific conduct alleged in the Summary of Factors follows: *701 Pharmacy Corp.*: inclusion of outdated drugs as part of its regular dispensing stock; failure to report a flood; unsanitary conditions; and improper recordkeeping. *Willen Pharmacy, Inc.*: unsanitary conditions; prescription log lacked name of prescribers and initials of dispenser on each line; pharmacy sign had same telephone number as an adjacent medical center and had name of doctor in violation of New York Education law; unlocked door leading directly from pharmacy to medical center. *Magnum Pharmacy, Inc.*: unlicensed individual creating prescription label; generic prescriptions lacked name of manufacturer or distributor; unsanitary conditions; lacked small graduates making it impossible to dispense reconstituted drugs; unlocked door leading to adjacent medical center. *Family Pharmacy, Inc.*: pharmacist observed running tablets and capsules through his hands into a counting machine; containers of repacked drugs contained no labels; no documentation of generic substitution; failure to initial prescription forms; adulteration and misbranding of drugs. *1491 DeKalb Pharmacy, Inc.*: violation of minimum 300 square foot requirement; generic prescriptions lacked name of manufacturer or distributor; no lot numbers on prescriptions; pharmacy office inaccessible to the handicapped; direct connection to adjacent medical center. *96 Cent Goods and Drugs, Inc.*: filling of more than one prescription from a

The pharmacies respond that (1) these (a) "factors" could also constitute "unacceptable practices" under § 515.2(b); and (2) an "unacceptable practice" under (b) does not necessarily include fraud or abuse. No evidence was adduced, however, to support either argument. On its face, the regulation defines an unacceptable practice as "conduct which constitutes fraud or abuse and includes" the specific practices that the Department considers egregious breaches of the Medicaid program's

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physician that would pose a health threat to the patient; Drug Enforcement Administration inventory not available; invoices for controlled drug purchases not available; lacked current Drug Information Book and Pharmacy Laws and Regulations Book. *Lasid Sales, Inc.*: repacked drugs without making entry into repacking logs; manufacturer's lot numbers not used; majority of certain drugs prescribed by only two physicians; unsanitary conditions; lacked certain graduates; prescription drugs stored in non-registered area together with expired drugs; failure to initial dispensed prescriptions. *Isham Broadway Pharmacy, Inc.*: possession of physician samples; repackaging in manufacturer's containers bore incorrect statements of quantity; repackaging in prescription vials usually did not bear statements of quantity. *MRB Pharmacy, Inc.*: outdated drugs in active dispensing stock; misbranded drugs; improper labelling; drugs repackaged without entries in repackaging log; unlicensed technicians dispensing prescriptions. *Sultan Pharmacy, Inc.*: routinely filling prescriptions for same patients prescribed by same physician; lacked certain graduates; failure to use manufacturer's lot numbers; unsanitary conditions. *Lawrence Drugs, Inc.*: dispensing unsigned prescriptions; dispensing prescriptions without proper indication of physician's name; dispensing drugs in excess of prescribed amounts; filling prescriptions for Medicaid beneficiaries from physicians whose prescriptions were valid only for Medicare beneficiaries. *67 East Burnside Pharmacy, Inc.*: expired drugs included as part of active dispensing stock; failure to document generic substitution. *Riteway Drugs, Inc.*: improper recordkeeping; possession and apparent sale of drug samples; failure to sign prescription forms; filling prescriptions by an unlicensed person. *Asim Drugs, Inc.*: failure of pharmacist to review computer prescription data typed by unlicensed person; prescriptions did not bear prescribers printed or imprinted name; prescriptions did not bear profession of prescriber; prescription log did not bear initials or signature of dispensing pharmacist.

standards. 18 N.Y.C.R.R. § 515.2(b). The pharmacies offered no evidence suggesting that providers have been terminated under § 504.7(b) for conduct that did not meet the definition's requirement of fraud or abuse. Nor is there any support in the record for the pharmacies' allegations that the conduct leading to their termination constituted unacceptable practices. No evidence was offered to demonstrate that the same "factors" supporting the pharmacies' termination under § 504.7(a) had constituted "unacceptable practices" supporting another provider's termination under § 504.7(b). According to the plain meaning of the regulations and the Department's unrebutted evidence, a provider who gets terminated under § 504.7(b) must have engaged in conduct that is egregious; and he is materially different from a provider terminated "without cause" under § 504.7(a). In the absence of proof to the contrary, there is no basis to conclude that the regulations or the enforcement thereof operate in an irrational fashion.

Moreover, we are not satisfied that the equal protection clause would be compromised even if occasional inequity resulted when the Department terminated providers under § 504.7(a) without cause, when the provider's conduct amounted to fraud or abuse and the Department might have proceeded under § 504.7(b).

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the

> achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 942-43 (1979) (footnote omitted); *see Dandridge v. Williams*, 397 U.S. at 485, 90 S. Ct. at 1161; *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1105 (1961); *Greene v. Town of Blooming Grove*, 879 F.2d 1061, 1064 (2d Cir. 1989).

Changing the focus slightly, the pharmacies suggest that the arbitrary nature of the *termination* regulations may be inferred by comparing the Department's *enrollment* regulations. Part 504 requires providers to submit applications for enrollment in the Medicaid program. *See* 18 N.Y.C.R.R. § 504.10(a). Section 504.10(a) applies to both prospective providers and providers enrolled as of January 5, 1987. Enrolled providers are required to file an application for reenrollment within sixty days following receipt of a notice from the Department. 18 N.Y.C.R.R. § 504.10(b). An applicant denied enrollment or reenrollment is entitled to file a written request for reconsideration, *see* 18 N.Y.C.R.R. § 504.5(e)(1), and thereafter may seek Article 78 review. *See, e.g., Karanja v. Perales*, 559 N.Y.S.2d 521 (1st Dep't), *appeal denied*, 76 N.Y.2d 715, 565 N.Y.S.2d 766 (1990); *Winyard v. Perales*, 161 A.D.2d 317, 554 N.Y.S.2d 919 (1st Dep't), *appeal dismissed*, 76 N.Y.2d 888, 561 N.Y.S.2d 549 (1990); *Barata v. Perales*, 157 A.D.2d 623, 550 N.Y.S.2d 642 (1st Dep't 1990). Each of the pharmacies here, except appellee Lawrence Drugs, Inc., properly sought and was granted reenrollment. Lawrence Drugs properly applied for and received new-enrollee status in February 1990.

The incongruity of the regulations, the pharmacies suggest, is that the Department affords a departmental review mechanism for applicants denied enrollment who typically have made little or no investment in their businesses, but denies even a written request for reconsideration to well-established providers terminated without cause. Although it is unfortunate that a provider relying on its Medicaid participation may effectively be put out of business if terminated, the department's rationale for refusing a written appeal is legitimate.

The Department does not contend that applicants who are denied either enrollment or reenrollment possess a *right* to a review process. Rather, the regulations reflect a more pragmatic concern. In one year, the Department makes approximately 100 times the number of enrollment decisions as it does decisions to terminate under § 504.7(a), with approximately the same number of employees making enrollment decisions and termination decisions. The written reconsideration procedure is thus aimed at minimizing the greater risk of error associated with an enrollment determination.

This is not to say, of course, that providers terminated under § 504.7.(a) have no legal recourse. As noted above, a provider's termination is subject to judicial review, albeit limited to the issue of malicious intent, under Article 78 of the C.P.L.R. Indeed, the pharmacies do not complain that Article 78 review is insufficient. They seek only to enjoy the administrative review mechanism afforded to providers terminated for fraud or abuse. We conclude, however, that the Department's regulations satisfy the rational basis test inasmuch as they represent a measured response to the State's obligation to provide quality health care to the indigent and

conserve public funds, while simultaneously affording enhanced procedural protection only to providers charged with fraud and abuse. The pharmacies' equal protection challenge, accordingly, must fail.

III. THE DUE PROCESS CHALLENGE

The pharmacies' remaining attack on the Department's regulations is a challenge under the due process clause of the fourteenth amendment. The pharmacies claim that continued participation in the Medicaid program is a property interest, of which they cannot be deprived absent a pre-termination hearing. We reject this argument. *See Kelly Kare*, slip op. at 16, decided today.

CONCLUSION

The judgments of the district court are reversed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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	:	CV-90-1671
1491 DEKALB PHARMACY, et al	:	United States Courthouse
Plaintiff,	:	Brooklyn, New York
v.	:	
PERALES,		May 24, 1990 12:00 p.m.
Defendant.	:	

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE I. LEO GLASSER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JACOBSON & GOLDBERG
BY: ROBERT PURZAK, ESQ.

For the Defendant: ANDREA AMY OSBORNE, ESQ.,
Assistant Attorney General

Court Reporter : MARY ANN SCOGNOMILLO
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Proceedings recorded by mechanical stenography, transcript produced by Computer-

Assisted Transcription

THE CLERK: Order to show cause for preliminary injunctions, 1491 DeKalb Pharmacy against Perales, 96 Cent Goods and Drugs against Perales and Lasid Sales, Inc., against Perales.

THE COURT: Note your appearances, please.

MR. PURZAK: For the plaintiffs, Jacobson and Goldberg, by Robert Purzak, 585 Stuart Avenue, Garden City, New York.

MS. OSBORNE: For the defendant, Andrea Amy Osborne, Assistant Attorney General.

THE COURT: Mr. Purzak, this is your motion.

MR. PURZAK: Thank you, your Honor. Your Honor, I recognize that this is our fourth appearance before the Court on these matters in the last -- I guess, the last two or three weeks so I won't belabor it. I

recognize the Court understands the issues by now.

One brief thing I would like to say is during our last appearance here, in response to the Court's inquiry, Mr. Schact (phn) stated to the Court that the reason why certain providers who are accused or are alleged to have engaged in unacceptable practices, the reason why certain of those providers are given hearings and others are simply terminated pursuant to a 30 day termination notice without the opportunity to be heard, was because of the fact that there would be further consequence to those providers who are given hearings.

However, Mr. Schact did acknowledge, after I made a statement that I represented clients who had been given hearings and no further consequences in terms of restitution or criminal sanctions have been sought

against them, Mr. Schact did acknowledge and did admit that there really is no distinction that is possible to have providers who are given administrative hearings and that would be it. Termination would be the end of the line of for them and there would be no other recourse sought against these providers in terms of restitution or criminal prosecution.

Your Honor, we have a situation here where it's readily apparent that the Department of Social Services is picking and choosing which providers are being given hearings and which providers are not being given hearings.

As everyone here recognizes and as the Attorney General has acknowledged, the charges brought or the reason stated in the termination notices relating to these providers here today are, and the previous grounds of four providers, all are tantamount

and are unacceptable practices. All fall within the purview of the statute relating to unacceptable practices.

Why these providers haven't been given hearings and why certain other providers who are accused of the identical types of violations are given hearings, the Attorney General has not been able to provide us with any rational basis for the State's action and for the lack of due process in the procedures allowed to these providers; and, your Honor, again it's the plaintiff's position that this constitutes a violation of equal protection under the laws.

THE COURT: All right. Miss Osborne, do you want to respond any further? We have been through this about three or four times, now, and I have heard Mr. Purzak's point of view several times before and I think I have heard the Attorney General's point of view,

but if you wish to state it again please feel free to do so.

MS. OSBORNE: I would just like to add, your Honor, that the Department's regulations only called for a paper review for process or denying applications or applications for enrollment and they do this because they wanted to guard against the risk --

THE COURT: Well, that's not relevant here. This isn't an application for enrollment. This is a termination of medicaid providers status.

I have received, just now, an affidavit signed by Anton R. Silva. I don't know whether you have seen it, have you?

MR. PURZAK: I just received a copy, myself.

THE COURT: In which he spends quite a number of paragraphs on the paper review process available, where applications to

become a medicaid provider are denied, but I just don't see any relationship or relevance between that procedure and what is before me here.

These aren't cases in which somebody is applying to become a medicaid provider. Somebody is a medicaid provider and he's being terminated. So, I am at a loss to understand what the significance of much of what Mr. Silva says in his affidavit for this proceeding.

MS. OSBORNE: I have nothing else to add, your Honor. Everything was set forth in our papers, at this point.

THE COURT: Again, just for purposes of the record, a preliminary injunction on a temporary restraining order can be granted -- you may be seated, Miss Osborne, thank you.

Can be granted only if certain prerequisites have been met.

First, there must be irreparable harm. Second, a likelihood of success on the merits or a significant question going to the merits with a likelihood of success, with a balance of hardship tipping in favor of the movant. That's H.P. Jackson -vs- Hudari or Hudari -vs- H.P. Jackson, 597 F.2d.

With respect to irreparable harm, I suppose it's conceivable that the harm to the plaintiffs, in the case before me now and in the cases that have been before me in the past, might be measurable in terms of dollars and cents.

However, the learning in the area of preliminary injunctions, particularly with respect to irreparable harm, I believe supports the assertion that where the harm which is alleged is a deprivation of a constitutional right, then that's sufficient.

The purposes of establishing irreparable

harm and the fact that it may be measurable in terms of money, does not preclude the granting of this relief.

In addition, where I think the cases also support the proposition that where the result of the conduct sought to be enjoined would be the destruction of a business, that constitutes irreparable harm.

So, I think there is irreparable harm here because I am finding that there is a significant denial of equal protection which the plaintiffs, I think, have a likelihood of success in establishing.

I would agree with the Attorney General and I suspect because I heard no mention of it today, that the plaintiff is abandoning his due process argument.

But if I am wrong about that, I would agree with the Attorney General that there is no due process claim upon which the plaintiff

can succeed.

There is certainly no constitutional right to be a medicaid provider and I think that the Board of Regents against Roth and its progeny would require that conclusion.

So, the only issue here is whether the Department of Social Services, the defendant, is depriving these plaintiffs of the equal protection of the laws.

The question is, are the plaintiffs being deprived of the equal protection of the laws where they are terminated pursuant to one subdivision of the regulations, 504.7(A) rather than 504.7(B).

The difference between the two is that 504.7(A) permits the termination of a medicaid provider upon 30 days notice with or without cause. No reason need be provided and there is no provision for notice and hearing.

You have 30 days within which to surrender your medicaid provider status but you're not entitled to any hearing, no administrative hearing, in which you can dispute the reasons for which you're being terminated, which may be rather peculiar to say after having just said that you can be terminated with or without cause and may be a circumlocution then to contend that you're being deprived of equal protection because you're not being given a dispute for reasons why you're being terminated, where no reasons been given, but in each of these cases reasons have been given.

In each of these cases notices of termination have been received by the various plaintiffs and in each a series of reasons have been set out as the basis for which they are being terminated and in each of these cases the plaintiffs contend the reasons

given are untrue.

The facts upon which the reason is based, plaintiffs allege in each one of these cases are false; and, yet, they have no opportunity to establish the falsity or meritlessness of the reasons advanced.

Whereas, if they were terminated under 504.7(B) they would be entitled to a hearing and given an opportunity to dispute the reasons for which their medicaid provider status is sought to be terminated, the unacceptable practices which have been listed under 504.7(B) as the reason for their termination.

So the issue very simply here is whether persons who are sought to be terminated under 504.7(A) and being told why they are being terminated; that is, the reasons for the termination, are being denied the equal protection of the law by not having an

opportunity to be heard with respect to that notice of termination.

Whereas, persons under 504.7(B) also given reasons for termination are entitled to a hearing.

Now, with respect to equal protection, if one class of persons is treated differently than another for reasons which are capricious or arbitrary where there is no rational basis which can be discerned for treating the parties differently, where there was no legitimate stated interest to be served by the difference in treatment between one group and another, and quite clearly there is a serious equal protection question being raised.

Back in 405 U.S., Lyndsey -vs- Normet, the Supreme Court, in the course of its opinion, says that you can't give appellate

review of a Court decision to one litigant and capriciously and arbitrarily deny it to another without violating the protection clause.

It would seem that that reasoning would be applicable here. You can't give administrative review to some medicaid provider and deny it to others without violating the equal protection clause, if the reasons for denying it to others are arbitrary or capricious.

So what remains to be done, it seems to me, is to examine whether or not the State is acting arbitrarily and capriciously in denying administrative review to one class, the 504.7(A) class, and granting it to the 504.7(B) class.

As near as I can tell from oral argument here last week by Mr. Schact, an Assistant Attorney General and from the affidavit

submitted to me this morning by Mr. Silva, the reasons for treating one class differently than another are, as I understand it, as follows:

Persons are terminated under 504.7(B) That is, terminated with an opportunity to dispute the reasons for the termination, dispute the unacceptable practices when their violations are so egregious that the Department seeks to impose criminal penalties or to pursue monetary remedies against the provider.

Now, with respect to that reason, it just is extremely difficult to understand. I am at a loss to understand why the State is precluded from pursuing or imposing a criminal penalty upon a person terminated under 504.7(A) since they don't have to give them any reason, but if the reasons are such as would justify a determination that a crime

is being committed, what principle of law precludes pursuing criminal penalties where a person has violated the criminal law or some other penal statute whether he's told why or isn't told why?

It makes no sense. Nor do I see any logical reason for saying that we can pursue a monetary remedy against somebody who we tell why we are terminating him and not pursue a monetary remedy against somebody who has committed the same wrongful act but we don't have to tell them why we are terminating.

Somebody can be terminated for fraud under 504.7(A), nothing to preclude it, because you can terminate it for any reason. If somebody committed fraud and is terminated under 504.7(A), what's to prevent the Commissioner or the State from seeking to recover such monetary loss which the State

claims it suffered because fraud has been perpetrated on it?

It just defies understanding as a rational basis for -- or some basis which has some relationship to the objective which this legislation seeks to achieve.

The other reason, I am told, for distinguishing between the two classes is that the Department, when they proceed under 504.7(B), wishes to suspend the provider's ability to reapply for a period of two years; whereas under 504.7(A) where they terminate them without notice, he can apply immediately.

Well, it just rather almost defies credulity to believe that a person is being terminated without notice and will be permitted to reapply the following day and be approved after being -- after having been terminated without notice.

If the purpose of terminating a person under 504.7(A) is to give them an opportunity to correct some deficiency, why not notify them that unless you take remedial action within a period of 30 days with respect to the deficiency which we tell you exist, then we will terminate you. It just doesn't make any sense.

The third reason also has no rational basis for it, that I can see. The Department wishes to give public notice of the provider's misconduct where they terminate them under 504.7(B) and are somehow precluded from giving public notice of misconduct, assuming there is misconduct, for which they terminate somebody under 504.7(A).

Is there some rule or regulation which says that the Department couldn't issue a press release for publication that we have terminated the XYZ Pharmacy situated at such

and such a place for the reasons which are as follows?

But beyond that, I think I can almost take judicial notice that each one of these pharmacies is located in an economically deprived area. Almost every one of these pharmacies, judging by their affidavits submitted by the pharmacies, are located in areas in which the overwhelming majority of their business is from medicaid recipients and it doesn't take much imagination to conclude that to terminate their medicaid provider status would effectively put them out of business and if everybody in the community in which they do business is then notified that we are no longer eligible to service your medicaid prescriptions, how much more public notice of disqualification would be needed to affect the persons who are being terminated.

The reasons, therefore, which are given just seem to me to be reasons which have no rational justification and bear no rational relationship to the objectives sought to be accomplished by this legislation.

The affidavit of Mr. Silva, for the most part -- I think I commented about much of what he says, relates to the application process and paper review process which really has no relevance here.

These are not pharmacies which have applied for medicaid status and have had their applications been denied. As I indicated, these are pharmacies who have medicaid provider status which is being terminated.

The reasons Mr. Silva gives are the same reasons which were given by Mr. Schact in which I just reviewed and I think I have commented without having to belabor it.

I will simply say that examining these affidavits and the reasons furnished for termination would also seem to me to be terribly arbitrary and capricious, and at the very least some of the reasons which are given are reasons which are unacceptable practices under 504.7(B) and would have entitled these people to a hearing.

With respect to two of the pharmacies reasons given I find very interesting. A pharmacist is being told that he should have passed upon the propriety of a prescription written by a doctor and made some determination as to whether the doctor writing the prescription is exercising his professional responsibility appropriately.

It may be that there is some regulation someplace which gives a pharmacist the right to second guess a doctor, but I don't know of it. I would be surprised if there were one.

Every one of these pharmacies, they complain there are four steps leading up to the pharmacy. Those steps were there when the application for medicaid provider status was approved, and now give that as a reason for terminating the medicaid provider status.

Assuming that the affiant is correct, that it was there -- the steps were there when I was approved, almost defies belief and to deprive the pharmacist or the pharmacy of an opportunity to be heard with respect to some of the reasons which seem completely specious and provides an opportunity to be heard to others, would seem to me is supported by no rational basis related to the act of this legislation and it's totally capricious and arbitrary.

Mr. Silva says that the difference between the unacceptable practice list for which somebody is terminated under 504.7(B)

and the reason given under 504.7(A), is that all of the unacceptable practices under 504.7(B) go to fraud or abuse of the medicaid system.

First, again, as I have indicated, I find it hard to understand what the relevance of that is. If you're terminating somebody for fraud or abuse, you can do it under 504.7(A) since you can do it for any reason or no reason just as effective as you can do it under 504.7(B); but, yet, there is notice and hearing in one case and not in the other.

Furthermore, it's just not true that all of the unacceptable practices listed in 515.2(B) of the NYCRR related to fraud and abuse of the medicaid system.

For example, (B)4, furnishing care, services or supplies while one's ability is impaired by alcohol, drugs, physical disabilities or mental disability.

What has that got to do with fraud or abuse of the medicaid process? If somebody is dispensing prescriptions while he's drunk or mentally disabled, he should be terminated under 504.7(A) or shouldn't be permitted to practice the profession of pharmacy under any provision.

To say that that is related somehow to fraud and abuse of the medicaid practice process and, therefore, you would be entitled to a notice of hearing is sheer nonsense.

515.2B(5), being habitually drunk or being dependent on or a habitual user of narcotics, barbiturates, amphetamines.

Again, this is just professional misconduct. What does it got to do with fraud or abuse of the medicaid system?

Engaging in illegal discrimination related to furnishing care, services or supplies on the basis of race, creed, color,

national origin, sex, age or handicap.

What does that got to do with fraud or the abuse of the medicaid system?

Rendering care, services or supplies while one's license to practice is suspended or revoked.

You can't terminate somebody under 504.7(A) who is practicing the profession of pharmacy with a revoked license. You can only do it under 504.7(B) where he's entitled to a hearing and then committing any act described as unprofessional conduct as defined by the New York State Board of Regents in its rules or by regulations of the New York State Commissioner of Education. What does that got to do with fraud or medicaid abuse?

Failing to maintain such records as are necessary to fully disclose the extent of care. What does that got to do with frauds

or medicaid abuse? Failing to maintain records required by the Public Health Law, Mental Hygiene Law. What does that got to do with fraud or medicaid abuse? I think I am belaboring the issue.

For the reasons indicated, I find that these plaintiffs are and will suffer irreparable harm. There is a great likelihood of success on the merits and the application for preliminary injunction is granted.

Now, as I think I asked the last time the parties were here, this is a preliminary injunction. Is there any reason why the injunction shouldn't be made permanent?

Is there anything further to be presented to me in the form of briefs or facts other than what is contained in the affidavits and the memoranda of law that I already received?

Is there anything else, anything new, any additional materials so that under Rule 65 of the Federal Rules of Civil Procedure some new further proceeding is necessary on a permanent injunction?

Do you know, Miss Osborne?

MS. OSBORNE: I am not aware of any, your Honor.

THE COURT: Is there any reason why this injunction shouldn't be made permanent and give the Department an opportunity to take an appeal immediately?

Do you have -- do you know of any reason why that shouldn't be done?

MS. OSBORNE: I don't know of any reasons, your Honor.

THE COURT: Okay. Mr. Purzak?

MR. PURZAK: I have nothing further, your Honor.

THE COURT: All right.

MR. PURZAK: In terms of their due process argument, the plaintiffs have not abandoned that. If I mislead the Court into believing that --

THE COURT: I think I indicated clearly enough I don't think your due process argument has any merit --

MR. PURZAK: I understand, your Honor.

THE COURT: The determination which I am making is predicated entirely upon equal protection, not due process.

All right. So why don't you submit an order enjoining the defendant permanently from proceeding under 504.7(A) and not giving the plaintiffs an opportunity to be heard as they would have if they were terminated under 504.7(B), because I find that there is no rational basis to be served, no rational basis for any State interest to be served, by proceeding under one subdivision as opposed

to the other and the reasons are entirely arbitrary and capricious.

The State hasn't shown one reason which I believe to have any merit for deciding to proceed under one subdivision as opposed to another. It would appear to be an entirely arbitrary and capricious process.

The other points which is made by the State in their briefs is that it's just not true that persons terminated under 504.7(A) have no opportunity to challenge it.

They have, they say, an Article 78 proceeding. That doesn't obviate, in my view, a denial of equal protection.

I don't see any reason why denying 504.7(A), the same administrative review process that 504.7(B) people have, is any lesser a denial of equal protection because somebody may have some other remedy to go to a State Court and start a judicial proceeding

rather than have some administrative hearing which they can, thereafter, contest in a State Court.

Why should 504.7(B), that class, have two bites at an apple and the 504.7(A) class only one. Why do the 504.7(B) have an administrative bite and a judicial bite, whereas the 504.7(A), we are told, can go to the State Court in an Article 78 proceeding, the rational basis for that.

In any event, for all those reasons, I am granting the plaintiffs the relief which they seek. Submit an order.

MR. PURZAK: Your Honor, would that be for all seven cases that have been before the Court?

THE COURT: Yes. They are all the same. Is that right, Miss Osborne?

MS. OSBORNE: I believe they are, your Honor.

THE COURT: All right. Thank you very much.

MR. PURZAK: Thank you, your Honor.

MS. OSBORNE: Thank you, your Honor.

(Whereupon, the proceedings in this matter are concluded.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

: CV-90-2098

ISHAM BROADWAY PHARMACY, INC., : United States
: Courthouse
Plaintiff, : Brooklyn,
New York

-against- :

CESAR A. PERALES, Aug. 10, 1990
COMM. N.Y. STATE SS 10:00 a.m.

Defendant. :

----------X

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE I. LEO GLASSER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ROBERT PURZAK, ESQ.

JEROME SAGER, ESQ.

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Assistant Attorney General

Court Reporter: Marsha Diamond
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Proceedings recorded by mechanical stenography, transcript produced by computer.

THE CLERK: Isham versus Perales; M.R.B. versus Perales.

MR. SAGER: Jerome Sager of Weiss Lehrman and Katz, 4440 Park Avenue South, New York for Isham.

MR. PURZAK: Robert Purzak, 585 Stewart Avenue, Garden City on behalf of the plaintiff Sulton Pharmacy, M.R.B. Pharmacy and Lawrence Drugs.

MR. SLOTNIK: Gerald Slotnik, Assistant Attorney General, Office of Robert Abrams, 120 Broadway, New York, New York. Attorney for the defendant Perales.

THE COURT: I believe you, Mr. Sager, are the attorney for the movant.

MR. SAGER: In the Isham case, yes, Your

Honor.

THE COURT: Do you want to be heard?

MR. SAGER: Yes, Your Honor.

This is and several others that you recently had before you, and that we are alleging the constitutional violation of equal protection clause.

The allegations against this pharmacy are under 504.7 A of 18 NYCR which is a section of the regulation that allows termination from medicaid without cause. The other section 504.7 B, has to allege unacceptable practices and require a hearing.

There is no rational reason to treat one provider in this medicaid program differently from other categories. The other categories, Your Honor, being those that apply for medicaid provided number or those are in the program and have to re-enroll.

Both of those categories are given an

opportunity of a review of any rejection that they may receive, while under 504.7 A there is no review whatsoever.

The answering papers of the counsel for the defendant Anton Silver in this case, I believe if you read his affidavit, are so ludicrous as to be absurd. He admits there is no unacceptable practices in this case. He admits there is no fraud and abuse. He states he has no need to give reasons. It is just that they simply don't want to do business with this provider any longer.

To get to the one allegation that they have against this provider, which they don't have to provide but they did, Your Honor, they state that there were unlabeled samples and outdated drugs in the pharmacy.

The affidavit that the owner of the pharmacy submitted stated that when he bought this pharmacy eight months ago these were in

the basement tied up in garbage bags segregated from the inventory.

I have quoted the regulation that says those items are segregated from inventory, they are not to be counted in inventories because they are meant for disposal or return.

There was, in fact, a federal drug enforcement administration inspector along when the medicaid inspector was there, and he agreed, and he supervised the destruction of the merchandise at that time.

How do you account for treating one category differently than the other here, Your Honor? I can't explain. It makes no sense. It is just simply a tool that the department has invented in their regulation to avoid giving a legitimate hearing to a provider who has a legitimate reason for his arguments and with no avenue to do so.

I think that there can be no doubt that

the regulation is unconstitutional. It is does not provide equal protection for the same category and therefore, I think that the injunction should be issued.

Mr. Purzak.

MR. PURZAK: Yes, Your Honor.

Thank you very much.

THE COURT: You are here on behalf of M.R.B.?

MR. PURZAK: Lawrence Drugs and Sulton Pharmacy, the three other plaintiffs.

As Your Honor is aware, I have appeared here on a number of occasions to argue identical type cases. There is nothing in the cases before the Court today that would distinguish it from the other cases, and I would simply rely upon this Court's decision in those prior cases, and ask that a permanent injunction be granted.

THE COURT: Does the Attorney General

wish to be heard?

MR. SLOTNIK: Yes, your Honor, briefly.

We are aware, of course, of the previous decision by this Court in the other cases and we have appealed, and our position is the essentially the same.

We believe our policies are in conformity with all state, federal regulations, with state and federal constitution and we have been upheld by most state courts on this particular policy. We intend to appeal, of course, in this case if there is an adversary decision and order.

THE COURT: What is the basis of your determination whether to proceed under Subdivision A or B of the regulations? On the basis of what do you make that determination?

What rational basis is there for making the determination that a person who is charged with fraud should not be terminated unless he

is first given a hearing, and a person who fills prescriptions which had been properly issued by a physician should be terminated without an opportunity to be heard? Because as I understand it, in one of those cases the Department of Social Services' conclusion was that the pharmacists should not have honored or filled the prescription issued by a duly licensed doctor.

How do you account for a determination being made that in one case where the wrong with which the pharmacy is charged is one which on its face appears to be quite serious and charging fraud on the medicaid program, issuing inflated vouchers, issuing vouchers which are not substantiated or supported by any pharmaceutical product which were sold?

How do you justify proceeding under Subdivision B and saying, well, you are entitled to a hearing before we can terminate

your right to participate in the program and somebody who you allege has a pharmacy which one has to get to by descending two steps should be terminated without any hearing? How do you distinguish between these cases? What prompts you to proceed under one subdivision as opposed to another?

MR. SLOTNIK: Well, Judge, to an outsider it may seem a little confusing but perhaps I can clarify to the extent that the A and the B subdivisions take place at different stages in our administrative process.

Under A the inspectors come in, they find deficiencies and then under the 504.7-A procedure termination without -- termination without a hearing is invoked; B is different.

THE COURT: Well, assume that the findings which are made by the inspector are entirely correct, that there is no basis upon which anybody can possibly controvert or

dispute the finding of the inspector, there is no basis upon which the pharmacy would be given an opportunity or should be given an opportunity to indicate that this very minor violation which is certainly the case in so many of the reasons which I find in these papers is one which may have been entirely inadvertent, which may have occurred without his knowledge or acquiescence and he is terminated without any opportunity to explain. Then you have a pharmacy who is accused of some very egregious violation of the rules and regulations and you say, well, we are not going to terminate him until we give him some opportunity to explain or controvert.

MR. SLOTNIK: B is invoked after a more detailed investigation. Your Honor, very frequently there are audits, what have you. B coincides, works with 515.

THE COURT: Sir, are you telling me that

a person who is charged after a detailed and thorough investigation has an opportunity to controvert, whereas a person who is a medicaid provider status has been terminated without any investigation that is thorough or otherwise but simply on the basis of some inspector coming in and observing one or two things which may or may not be correct or accurate, that that person is not entitled either to notice or a hearing?

MR. SLOTNIK: You are given notice on both.

THE COURT: I misspoke. A hearing, an opportunity to be heard. You are given notice that you are terminated period.

MR. SLOTNIK: That is correct.

THE COURT: I understand that. No opportunity to explain, no opportunity to controvert, no opportunity to contest.

And the answer I get from the Attorney

General is, well, the pharmacy has an opportunity in that case to start an Article 78 proceeding in the state court.

Why should he have had to go through an Article 78 proceeding where there may be absolutely no basis at all for his termination and that could have been resolved in an administrative hearing had he been given an opportunity to explain?

MR. SLOTNIK: Well, Your Honor --

THE COURT: Why do you make the decision in one case and not in another?

How do you choose as between 504.7 A and 504.7 B? Is it that in one case there is a thorough investigation and in another there isn't?

MR. SLOTNIK: The regulations are invoked at different stages, are administrative process.

The B is a result of a 515, working with

section 515; 515 meaning there has been a detailed audit.

Here I am not disputing that 504.7 A which is invoked after an inspection -- inspector comes in, but the inspectors who do come in are pharmacists. These are experienced people, and these are not light reasons. The reasons are not frivolous for terminating these people. These are serious violations. I am not talking just about steps or the configuration a pharmacy. The business with these defendant -- many of these cases -- I have defended many of these cases and all these cases have common elements: Frequent common violations, mislabling, the repack logs. These are serious violations impinging upon the public health, safety and welfare.

THE COURT: May I ask, is there some regulation or rule that you can call to my attention which provides that when a doctor

writes a prescription and his patient brings it to a pharmacy, that the pharmacist should second guess the doctor and make his own determination as to whether that prescription was properly issued, is there some rule or regulation which obligates a pharmacist to do that?

MR. SLOTNIK: Well, Your Honor, the pharmacist is under a duty to expect the prescription, to make sure it has been properly filled out, properly signed, and there are many of these cases -- we have had cases of pharmacists working with doctors just filing prescriptions which are in effect drug mills or they are filling prescriptions where they should have known better, where the prescriptions were not properly filled out, signed or whether they should have been on notice, that when they see a constant stream of controlled substances. Now I am repeating.

I am giving you a rendition of my experience.

THE COURT: Is that true in any of these cases where the pharmacy is charged with being a drug mill?

MR. SLOTNIK: I wasn't saying that in these cases.

THE COURT: That is what I have got, these cases before me. I have got cases in which you say that a pharmacist filled the prescription for medication which this patient shouldn't have been taking or a pharmacist filled a prescription which was prescribed to the same patient within a short period of time and he shouldn't have done it, notwithstanding the fact that a prescription was issued by a doctor duly licensed to practice medicine, the prescription was signed and in all other respects was perfectly proper.

Let me just -- excuse me, sir.

Let me just see if I can get an answer to

the question which I put. Do you know of any rule, regulation, protocol, professional limitation which says that a pharmacist is under an obligation to question a prescription issued by a doctor, make his own determination as to whether the medication prescribed is proper or improper for the customer to take? Do you know of any such rule?

MR. SLOTNIK: I am not aware of that, Your Honor.

THE COURT: In one of these cases you are terminating a medicaid provider because his pharmacy is gotten to by descending two steps; is that right?

MR. SLOTNIK: I read that. I recall that somewhere about the configuration.

THE COURT: That was there when this pharmacist was authorized or designated as a medicaid provider. He didn't add these two steps at a later date. It has been there all

along.

Now, if he was a perfectly proper medicaid provider when initially authorized to do that and the physical approach to the pharmacy has not changed one bit why is that a reason for now terminating his medicaid provider status?

MR. SLOTNIK: I think I can clarify that, Judge. On enrollment application very frequently the provider sends in papers. It is done on papers. They look them over, they are satisfied they take them in, but we are not estopped from going in later. Many enrollments take place, re-enrollments take place approximately every two years. In addition, of course, the Department of Social Services is free to send in inspectors to inspect the premises, inspect records. We are not estopped from terminating him later or penalizing later if we find the violation.

THE COURT: Nobody is suggesting that there is an estoppel operating here but what is being suggested is that as a matter of surrounding equal protection there has to be some rational basis upon which the state proceeds against one faction as against one class of persons and another faction as against the same class of persons.

There must be some rational basis for proceeding in one way as opposed to another where you are dealing with the same class of people, namely, pharmacists.

There must be some rational basis upon which a determination is made that one person in the class will be terminated as a medicaid provider without any opportunity to be heard and another person in the same class will not be terminated as a medicaid provider before he is given an opportunity to be heard, and determinations which I have been making in the

cases which have been presented to me and the determination which I am making in the cases which are before me this morning is that I can discern absolutely no rational basis upon which your client is proceeding as against one group of persons in a class in one way and proceeding in a completely different way as to or as against another group of persons in the same class: Providing one group of persons in the class of pharmacists with an opportunity to be heard, and providing another group of pharmacists with no opportunity to be heard. Within my view: No rational basis upon which I can see for proceeding in one way as opposed to one group and another way as opposed to other persons in that same class, and for those reasons I am going to grant the motion which has been brought and which if you will submit an order I will sign it.

MR. PURZAK: Thank you. ll thank you.

THE COURT: Thank you very much.

MR. SLOTNIK: Thank you.

(Proceedings concluded.)

515.7 Immediate sanctions. (a) Notwithstanding any provision of this Title to the contrary, the department, upon notice to the person, may take immediate action under this section.

(b) Upon receiving notice of an indictment which charges a person with committing an act which would be a felony under the laws of New York and which relates to or results from: (1) furnishing or billing for medical care, services or supplies; or (2) participation in the performance of management or administrative services relating to furnishing medical care, services or supplies, the department may immediately suspend the person and any affiliates, and may continue the suspension for 90 days following the receipt of notice of the disposition of the indictment.

(c) Upon receiving notice that a person

has been convicted of a crime which relates to or results from: (1) the furnishing of or billing for medical care, services, or supplies; or (2) participation in the performance of management or administrative services relating to furnishing medical care, services, or supplies, the department may immediately exclude the person and any affiliates from participation in the program.

(d) Upon determining that the public health or welfare of the health or welfare of a recipient would be imminently endangered by the continued participation of any person in the program, the department may immediately exclude the person and any affiliates until the conditions giving rise to the suspension have been corrected or a further investigation determines that there is insufficient evidence to support a continued exclusion.

515.2 Unacceptable practices under the medical assistance program. (a) General. An unacceptable practice is conduct by a person which is contrary to:

(1) the official rules and regulations of the department;

(2) the published fees, rates, claiming instructions or procedures of the department;

(3) the official rules and regulations of the Departments of Health, Education and Mental Hygiene, including the latter department's offices and divisions, relating to standards for medical care and services under the program; or

(4) the regulations of the Federal Department of Health and Human Services promulgated under title XIX of the Federal Social Security Act.

(b) Conduct included. An unacceptable practice is conduct which constitutes fraud or abuse and includes the practices specifically enumerated in this subdivision.

(1) False claims. (i) Submitting, or causing to be submitted, a claim or claims for:

(a) unfurnished medical care, services or supplies;

(b) an amount in excess of established rates or fees;

(c) medical care, services or supplied provided at a frequency or in an amount not

medically necessary; or

(d) amounts substantially in excess of the customary charges or costs to the general public.

(ii) Inducing, or seeking to induce, any person to submit a false claim under this subdivision.

(2) False statements. (i) Making, or causing to be made any false, fictitious or fraudulent statement or misrepresentation of material fact in claiming a medical assistance payment, or for use in determining the right to payment.

(ii) Inducing or seeking to induce the making of any false, fictitious or fraudulent statement or a misrepresentation of material fact.

(3) Failure to disclose. having knowledge of any event, affecting the right to payment of any person and concealing or failing to disclose the event with the intention that a payment be made when not authorized or in a greater amount than due.

(4) Conversion. Converting a medical assistance payment, or any part of such payment, to a use or benefit other than for the use and benefit intended by the medical assistance program.

(5) Bribes and kickbacks. Unless the discount or reduction in price is disclosed to the client and the department and reflected in a claim, or a payment is made pursuant to a valid employer-employee

relationship, the following activities are unacceptable practices:

(i) soliciting or receiving either directly or indirectly any payment (including any kickback, bribe, referral fee, rebate or discount), whether in cash or in kind, in return for referring a client to a person for any medical care, services or supplies for which payment is claimed under the program.

(ii) soliciting or receiving either directly or indirectly any payment (including any kickback, bribe, referral fee, rebate or discount), whether in cash or in kind, in return for purchasing, leasing, ordering or recommending any medical care, services or supplies for which payment is claimed under the program;

(iii) offering or paying either directly or indirectly any payment (including any kickback, bribe, referral fee, rebate or discount), whether in cash or in kind, in return for referring a client to a person for any medical care, services or supplies for which payment is claimed under the program; or

(iv) offering or paying either directly or indirectly any payment (including any kickback, bribe, referral fee, rebate or discount), whether in cash or in kind, in return for purchasing, leasing, ordering or recommending any medical care, services or supplies for which payment is claimed under the program.

(6) Unacceptable recordkeeping. Failing to maintain records necessary to fully disclose

the medical necessity for and the nature and extent of the medical care, services or supplies furnished, or to comply with other requirements of this Title.

(7) Employment of sanctioned persons. Submitting claims or accepting payment for medical care, services or supplies furnished by a person suspended, disqualified or otherwise terminated from participation in the program or furnished in violation of any condition of participation in the program.

(8) Receiving additional payments. Seeking or accepting any gift, money, donation or other consideration in addition to the amount paid or payable under the program for any medical care, services or supplies for which a claim is made.

(9) Client deception. Deceiving, misleading or threatening a client, or charging or agreeing to charge or collect any fee in excess of the maximum fee, rate or schedule amount from a client.

(10) Conspiracy. Making any agreement, combination or conspiracy to defraud the program by obtaining, or aiding anyone to obtain, payment of any false, fictitious or fraudulent claim.

(11) Excessive services. Furnishing or ordering medical care, services or supplies that are substantially in excess of the client's needs.

(12) Failure to meet recognized standards. Furnishing medical care, services, or supplies that fail to meet professionally

recognized standards for health care or which are beyond the scope of the person's professional qualifications or licensure.

(13) Unlawful discrimination. Illegally discriminating in the furnishing of medical care, services or supplies based upon the client's race, color, national origin, religion, sex, age or handicapping condition.

(14) Factoring. Assigning payments under the program to a factor, either directly or by power of attorney; or receiving payment through any person whose compensation is not related to the cost of processing the claim, is related to the amount collected or is dependent upon collection of the payment.

(15) Solicitation of clients. Offering or providing any premium or inducement to a client in return for the client's patronage of the provider or other person to receive care, services or supplies under the program.

(16) Other prohibited acts. With respect to any person not a provider, committing any act which would result in the termination of a provider's enrollment in the program pursuant to section 504.7 of this Title.

As the result of an on-site inspection of this pharmacy on 3/1/90, the following violations were observed and noted:

1. Adulteration of Drugs. It was observed that the pharmacist was running the tablets and capsules through his hands into a counting machine. The purity and safety of the medications cannot be guaranteed and the patients' safety is at risk (Education Law - 6815).

2. Violative Repacking of drugs. It was observed that there were seventy-four (74) containers of repacked drugs with no labels as required. The lack of labeling is misbranding and because there is no expiration date or lot number on the package, patient or the pharmacist could not react to a drug recall thus placing the patients' health in jeopardy (8 NYCRR 29.7(a)(15)).

3. Failure to Document in Cases of Generic Substitution. It was observed that in cases of generic substitution, the pharmacy does not place the name of the manufacturer or distributor on the prescription. If there is a drug recall, the pharmacist will not be able to determine which prescription is affected (Education Law - 6816(a)(1)(c)).

4. Failure to initial, by hand, prescription forms. There is no proof that a pharmacist filled the prescription (8 NYCRR 29.7(a)(3)).

5. Observed bottle of medications which contained more pills than the manufacturers label stated. This is adulteration and misbranding according to Education Law

6815(2)(a). As a result, the safety and purity of these drugs are compromised since the lot numbers, expiration dates or origin of such drugs cannot be determined.

(2)

No. 90-1829

Supreme Court, U.S.
FILED
JUN 27 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

701 PHARMACY CORP., WILLEN PHARMACY, INC., MAGNAM PHARMACY, INC., FAMILY PHARMACY, INC., 1491 DEKALB PHARMACY, INC., 96 CENT GOODS AND DRUGS, INC., LASID SALES, INC., ISHAM BROADWAY PHARMACY, INC., MRB PHARMACY, INC., SULTAN PHARMACY, INC., LAWRENCE DRUGS, INC., 67 EAST BURNSIDE PHARMACY, RITEWAY DRUGS, INC., ASIM DRUGS, INC., *Petitioners*,

—against—

CESAR PERALES, Commissioner of the New York State Department of Social Services, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Regulations

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18 N.Y.C.R.R. § 504.7(b) ..... *passim*

18 N.Y.C.R.R. § 504.15(e)(14) 2

18 N.Y.C.R.R. § 515.6(b)(2)(vi) 2

18 N.Y.C.R.R. Part 519 2

18 N.Y.C.R.R. § 519.4(a) 2

18 N.Y.C.R.R. § 519.4(b) 2

Other Authorities

Stern, Grossman & Shapiro, Supreme Court Practice (6th ed. 1986) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1829

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701 PHARMACY CORP., WILLEN PHARMACY, INC., MAGNAM PHARMACY, INC., FAMILY PHARMACY, INC., 1491 DEKALB PHARMACY, INC., 96 CENT GOODS AND DRUGS, INC., LASID SALES, INC., ISHAM BROADWAY PHARMACY, INC., MRB PHARMACY, INC., SULTAN PHARMACY, INC., LAWRENCE DRUGS, INC., 67 EAST BURNSIDE PHARMACY, RITEWAY DRUGS, INC., ASIM DRUGS, INC.,

Petitioners,

—against—

CESAR PERALES, Commissioner of the New York State Department of Social Services,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent Cesar Perales, Commissioner of the New York State Department of Social Services ("the Department"), respectfully submits this brief in opposition to the petition for certiorari. The petition should be denied because it does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

STATEMENT OF THE CASE

The court of appeals held in these consolidated appeals that New York's termination under 18 N.Y.C.R.R. § 504.7(a) of petitioners' participation in the Medicaid program did not deprive petitioners of a property interest, inasmuch as section 504.7(a), which became effective on January 5, 1987, permits termination without cause. *701 Pharmacy Corp. v. Perales*, 930 F.2d 163 (2d Cir. 1991) (1-a).[1] The court thus unanimously held, relying upon its opinion rendered the same day in *Kelly Kare Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), that New York had not violated petitioners' rights under the Due Process Clause. (16-a). *See also Senape v. Constantino*, No. 90-7677 (2d Cir. June 18, 1991) (A-1a *et seq.*) (denial of re-enrollment under 18 N.Y.C.R.R. § 504.15(e)(14), which confers broad discretion upon the Department to deny reenrollment in Medicaid program based upon any factor affecting "the effective and efficient administration of the program", does not deprive provider of property interest).

The court further held that petitioners' rights under the equal protection clause had not been violated. The court rejected the argument that the State impermissibly differentiated between providers terminated without cause under 18 N.Y.C.R.R. § 504.7(a) and those terminated for "unacceptable practices" under 18 N.Y.C.R.R. Part 504.7(b). Providers in the former group are not afforded a hearing; those in the latter group receive a hearing. *Compare* 18 N.Y.C.R.R. §§ 504.7(a) and 519.4(b) *with* 18 N.Y.C.R.R. §§ 504.7(b), 515.6(b)(2)(vi), and 519.4(a).[2] The court upheld this disparity

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1 References to the Petition, the Appendix to the Petition, and the Appendix to this brief are cited as "___", "___-a", and "A-___a", respectively.

2 The court below accurately described the Department's regulatory scheme for enrolling and terminating providers (5-a to 7-a), except insofar as it stated that providers terminated under Part 504.7(b) are afforded a pre-deprivation hearing. (3-a). Nothing in the regulations requires that the opportunity for a hearing be afforded before the effective date of a section 504.7(b) termination. *See* 18 N.Y.C.R.R. Part 519.

based upon (1) the Department's unrebutted allegation that providers terminated for unacceptable practices under Part 504.7(b) have generally engaged in more serious wrongdoing than those terminated without cause under section 504.7(a) (13-a); and (2) the more serious consequences that befall a provider terminated under section 504.7(b).[3] (7-a to 16-a).

On June 10, 1991, after the court of appeals had denied petitioner's application for a stay of the mandate pending filing and disposition of a petition for certiorari, Justice Marshall denied petitioners' application for a stay pending disposition of the petition.

REASONS FOR DENYING THE WRIT

The first question presented in the petition is whether the Due Process Clause requires that providers excluded from a State's Medicaid program under a "without cause" standard are entitled to hearing. There can be no serious dispute with the proposition that under *Board of Regents v. Roth*, 408 U.S. 564 (1972) and its progeny, providers who can be so terminated lack a property interest in continued participation in the Medicaid program. In rejecting petitioners' due process claim, the court of appeals thus simply applied well-established principles. (16-a) (citing *Kelly Kare*, 930 F.2d at 174-76); *accord Senape*, *slip op.* at A-8a to A-10a.[4]

Petitioners claim that a property interest was implicated here because the Department based its termination upon

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3 For example, as the court of appeals recognized, providers who are terminated for "unacceptable practices" under Part 504.7(b) face censure and exclusion from the Medicaid program for a definite period of time. (9-a). Furthermore, notice of a Part 504.7(b) exclusion must be given to the federal government, which may exclude the provider from the Medicare program. (*Id.*) A provider terminated under Part 504.7(b) is also excluded from any involvement relating to the provision of care to medicaid recipients. (*Id.*) None of these sanctions applies to a § 504.7(a) termination, and a provider terminated thereunder may reapply for participation at any time. (10-a).

4 Unlike in *Kelly Kare*, 930 F.2d at 176, petitioners here do not rely upon New York Social Services Law § 364(2)(b) (McKinney 1983).

"charges" of serious violations affecting the public health (*e.g.*, 19, 41) and communicated those allegations to petitioners. (7-a). It is of course undeniable that the Department acted for reasons; it can hardly be assumed that the State acts mindlessly. *See Meachum v. Fano*, 427 U.S. 215, 228 (1976). But the issue is not whether the State's actions had a root in reason, or whether reasons were conveyed to petitioners, but whether the State, as a matter of law, can terminate a provider's contract only for cause or may do so without having to establish a basis. *Meachum*, 427 U.S. at 228. As the court of appeals recognized, the Department has broad discretionary authority to terminate participation in the Medicaid program without a finding of cause. (8-a). *Accord Senape*, *slip op.* at A-9a to A-10a; *Kelly Kare*, 930 F.2d at 177.

Contrary to petitioners' contention, there is no conflict in the courts of appeals as to the existence of a property interest in this context. Preliminarily, even assuming that a split within a circuit were a basis for a grant of certiorari, *but see Davis v. United States*, 417 U.S. 333, 340 (1974), there is no split within the Second Circuit. The Second Circuit stressed in *Kelly Kare*, 930 F.2d at 175, and *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 582 (2d Cir. 1989), that its statements in *Patchogue Nursing Home v. Bowen*, 797 F.2d 1137, 1144-45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987), and *Case v. Weinberger*, 523 F.2d 602 (2d Cir. 1975), concerning a nursing home's property interest in continued participation in the Medicaid program, were in the nature of dicta. Moreover, *Patchogue Nursing Home* and *Case* did not address a regulatory scheme providing for "without cause" termination. *Kelly Kare*, 930 F.2d at 175, 176 n.2; *Senape*, *slip op.* at 9a n.4.

Nor is there a real conflict among the circuits. The First and Tenth Circuits have held that where, as here, providers do not have a right to continued participation in a medical assistance program absent good cause, the termination of a provider does not implicate a property interest. *Koerpel v. Heckler*, 797 F.2d 858, 863-65 (10th Cir. 1986); *Cervoni v.*

Secretary of Health, Education and Welfare, 581 F.2d 1010, 1017-19 (1st Cir. 1978). No cases analyzing the issue have reached a different result. Petitioners' reliance on *Ram v. Heckler*, 792 F.2d 444, 447 (4th Cir. 1986) is mistaken since that case involved HHS' termination of a physician from the Medicare program, and like the Second Circuit's decisions in *Case* and *Patchogue*, addressed the issue only by way of a single sentence that is in the nature of dictum. Moreover, *Ram* relied solely on *Bowens v. North Carolina Dept. of Human Resources*, 710 F.2d 1015 (4th Cir. 1983), which based its recognition of a property interest upon a state regulation permitting termination of a provider only for cause. *Id.* at 1018. *Hathaway v. Mathews*, 546 F.2d 227 (7th Cir. 1976) simply relied upon *Case* and the appellant's apparent concession and in any event did not involve a regulatory scheme authorizing termination without cause. *Ritter v. Cohen*, 797 F.2d 119 (3d Cir. 1986) and *Cassim v. Bowen*, 824 F.2d 791, 796-97 (9th Cir. 1987) merely assumed the existence of a property interest, and *Ritter* did so based on an arguable construction of a state regulation permitting termination only for cause. *Id.* at 122. *See also Doe v. Bowen*, 682 F. Supp. 637, 642 (D. Mass 1987) (holding that HHS' termination of medicaid and medicare provider implicates a property interest because Secretary applies a good cause standard).

The second question raised in the petition, *i.e.*, whether the Department's action deprived petitioner of a liberty interest without due process, is not properly presented. None of the petitioners raised a liberty interest claim in their complaint or on appeal and therefore the court of appeals did not address the issue. Absent extraordinary circumstances not present here, an issue may not be raised for the first time in a petition for certiorari. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); Stern, Grossman & Shapiro, *Supreme Court Practice* at 364 (6th ed. 1986).

Moreover, *Koerpel v. Heckler*, 797 F.2d at 865-66, the primary court of appeals decision relied upon by petitioners

with respect to the liberty interest issue,[5] held only, consistent with *Bishop v. Wood*, 426 U.S. 341, 348 (1976), that when a provider alleges that stigmatizing reasons for his exclusion are to be published, he has raised a substantial due process claim. Here, however, the providers made no such allegation. (9-a to 10-a; *see Kelly Kare*, 930 F.2d at 177).

As to the equal protection issue which is the chief focus of the court of appeals' opinion, petitioners do not assert a conflict among the circuits and do not demonstrate why the court's opinion is open to question. As the court of appeals held, "[t]here is nothing anomalous about treating rule violations in a manner proportionate to the violation and providing enhanced procedural protections to those charged with more serious infractions" (11-a) and facing more serious consequences. *Id.* "[T]he Department's regulations satisfy the rational basis test inasmuch as they represent a measured response to the State's obligation to provide quality health care to the indigent and conserve public funds, while simultaneously affording enhanced procedural protection only to providers charged with fraud and abuse." (15-a to 16-a).

Petitioners argue that their right to equal protection was violated because the factors that underlay the Department's termination under section 504.7(a) could also have constituted unacceptable practices forming the basis for a section 504.7(b) termination. As the court of appeals recognized, however, the argument ignores (1) the Department's unrebutted explanation that a termination for unacceptable practices generally involves more egregious conduct than a section 504.7(a) exclusion and (2) the lack of any evidence demonstrating that some providers who were cited for the same conduct as petitioners have been terminated under section 504.7(b). (13-a). The court of appeals thus correctly ruled that there was "no basis to conclude that the regulations or

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5 Contrary to petitioners' assertion, the Seventh Circuit in *Sommerset House, Inc. v. Turnock*, 900 F.2d 1012, 1015 (7th Cir. 1990), did not address the question of whether the challenged governmental action affected a property or liberty interest.

the enforcement thereof operate in an irrational fashion." (*Id.*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
June 27, 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 804—August Term, 1990

(Argued: January 10, 1991 Decided: June 18, 1991)

Docket No. 90-7677

SAVERIO SENAPE, M.D.,

Plaintiff-Appellant,

—v.—

JOANN A. CONSTANTINO, Deputy Commissioner, Division of Medical Assistance, CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services, and the DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellees.

Before:

WINTER and ALTIMARI, *Circuit Judges*, and WEXLER, *District Judge.**

* The Hon. Leonard D. Wexler, United States District Judge for the Eastern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles H. Tenney, *Judge*) dismissing a complaint alleging a deprivation of property and liberty interests without due process of law in connection with a decision by state officials not to reenroll a physician-provider in the New York State Medicaid program.

Affirmed.

ROBERT C. AGEE, White Plains, New York, *for Plaintiff-Appellant*.

CAROL SCHECHTER, Assistant Attorney General, New York, New York (Robert Abrams, Attorney General of the State of New York, Lawrence S. Kahn, Deputy Solicitor General, Robert J. Shack, Assistant Attorney General, New York, New York, of counsel), *for Defendants-Appellees*.

WINTER, *Circuit Judge*:

This appeal arises from the dismissal of a complaint brought under 42 U.S.C. § 1983 seeking (1) to enjoin appellees from denying appellant's application for reenrollment as a physician-provider in New York State's Medicaid program and (2) to recover damages for the deprivation of property and liberty interests without due process. The district court held that appellant has no property interest in his continued enrollment as a Medicaid provider and that, even if he has such an

interest, he was accorded due process. The district court also rejected appellant's deprivation of liberty claim on the ground that he failed to plead facts sufficient to establish the publication of stigmatizing information. For the reasons stated below, we affirm.

BACKGROUND

In 1979, Saverio Senape, M.D., was enrolled as a qualified medical provider in New York's Medicaid program, which provides medical services to indigent people. *See* 42 U.S.C. § 1396a *et seq.* (1988); N.Y. Social Services Law § 363 *et seq.* (McKinney Supp. 1991). The instant action arises out of a decision by state officials not to reenroll him.

1. *The Regulatory Scheme*

Under New York Soc. Serv. Law § 363a (1) and (2), the Department of Social Services ("DSS" or "Department"), which administers the Medicaid program, is authorized to make regulations governing the selection of medical services providers.[1] *See* N.Y. Comp. Code R. & Regs. ("NYCRR"), tit. 18 § 500 *et seq.* (1988). Two portions of these regulations—Parts 504 and 515—are pertinent to the instant appeal. We discuss each briefly.

Prior to 1987, a physician who had been accepted into the Medicaid program could be terminated only upon a finding of a failure to comply with DSS regulations, *i.e.*, for cause. However, in January of that year, DSS

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1 A "provider" is a person authorized to provide medical care, services or supplies to eligible recipients and to receive payment from Medicaid for the provision of such care, services and supplies. *See* N.Y. Comp. Code R. & Regs. ("NYCRR"), tit. 18, § 504.1(16) and (19).

issued a regulation under which all existing providers were required to apply for reenrollment. *See* 18 NYCRR § 504.10. Judge Tenney explained the effect of these new regulations as follows:

> Although DSS retains the authority to terminate a provider for cause, the new regulations in effect allow DSS, at its option, to invert the process. Instead of investigating each provider for deficiencies and terminating those found inadequate, DSS may require all providers to re-enroll en masse in the program and then choose whom it wishes to renew.

The standard governing reenrollment is the same as that applied to first-time applicants, "the best interest of the medical assistance program," 18 NYCRR § 504.4(e)(2), and, although many factors enumerated in the regulation focus on past or current conduct or competence, *id.* at § 504.5(a)(1)-(13), the regulation explicitly permits the Department to consider "any other factor which may affect the effective and efficient administration of the program, including, but not limited to, the current availability of medical care, services or supplies to recipients. . . ." *Id.* at § 504.5(a)(14). As the district court observed, the regulation affords DSS a mechanism by which a provider's participation may be terminated notwithstanding the applicant's apparent qualifications and lack of evidence of wrongdoing.[2]

By contrast, Part 515 sets forth the standards and procedures for sanctioning providers who engage in

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2 At the same time that the Department propounded its reenrollment regulation, it also codified the "at will" nature of providers' contractual participation in the program, *see* 18 NYCRR § 504.7(a), the provision at issue in *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), discussed *infra*.

"unacceptable practices" such as fraud or other specifically enumerated violations of DSS regulations. *See* 18 NYCRR § 515.2(a) and (b). A provider sanctioned under this provision is subject not only to termination of his reimbursement contract, *see Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), but to exclusion from the program for a reasonable period of time, censure and the recovery of overpayments. 18 NYCRR § 515.3. Pursuant to federal regulations, moreover, notice of the provider's exclusion must be published. *See* 42 C.F.R. § 1002.206(c) (1990).

A disappointed applicant for enrollment or reenrollment under Part 504 is afforded less procedural due process than a provider facing sanctions under Part 515. A provider whose enrollment or reenrollment application is denied under Section 504.10, or whose participation in a reimbursement contract is discontinued under Section 504.7(a), is not entitled to a hearing. *Id.* at § 519.4(b). A provider charged with sanctionable practices, however, has the right to an evidentiary hearing. *See* 18 NYCRR § 515.8.

2. *The Instant Action*

In October 1987, appellant received a letter from DSS, sent according to a prearranged schedule involving all Medicaid providers, informing him that he would have to submit an application for reenrollment within sixty days. In November, shortly after appellant submitted the requisite forms, a DSS investigator visited appellant's office and requested copies of the medical records of ten patients. On March 8, 1988, DSS informed appellant that it had found various violations of DSS regulations in reviewing the patient records and had decided to

terminate appellant's participation in the program effective immediately. Initially, the Department based its termination decision on Part 515, which permits, *inter alia*, the immediate suspension of a provider upon a determination that the health or welfare of Medicaid recipients would be endangered by the provider's continued participation in the program. Appellant promptly contested this ruling and submitted various documents to DSS for further review. On March 15, before responding to the Part 515 appeal, DSS informed appellant that, based on its review of patient charts, it had decided pursuant to Part 504 not to reenroll him in the program. At that time, DSS also advised appellant that he could submit a written appeal of the Part 504 decision, which he did. On April 18, DSS informed appellant that it had reversed its earlier Part 515 termination decision but that the Part 504 reenrollment appeal was still under consideration. On July 29, DSS told appellant that it had denied his Part 504 appeal and that his participation in the program would cease effective August 12.

DISCUSSION

We assume for purposes of this appeal that DSS denied appellant's application for reenrollment under Part 504 because it was simpler than terminating appellant for cause under Part 515. By proceeding under Part 504, DSS avoided the need for an evidentiary hearing and availed itself of the discretion conferred by Section 504.5(a)(14). Appellant claims that this resort to Part 504 deprived him of a protected property right to continued enrollment in the Medicaid program and, additionally, of a liberty interest in his good name and professional reputation without due process. We dis-

agree. In light of the broad discretion afforded state officials charged with administering the Medicaid program, a provider has no reasonable claim of entitlement to continued enrollment in that program. Nor does appellant's complaint plead facts sufficient to establish publication of stigmatizing information, an essential element of his deprivation of liberty claim.

Our previous decisions have not resolved the question of whether a qualified provider of medical services under the New York Medicaid program has a property right in that status. In *Kelly Kare, Ltd. v. O'Rourke*, we held that a provider has no right to "uninterrupted participation in the program, i.e., a continuing reimbursement contract," but added that "there may be a property interest in a provider's status as a qualified health-care provider—a question we need not and do not reach." 930 F.2d at 176. We thus stated:

> There is a critical difference between being declared a qualified health-care provider and being awarded a contract to furnish health-care services. The refusal by a social services district to enter a contract with a qualified provider in no way affects the status of the provider. Such a disappointed provider remains free to seek a contract with a different social services district. . . .

Id. Unlike *Kelly Kare*, however, Dr. Senape is asserting a property right in his continued enrollment in the Medicaid program—*i.e.*, in his status as a qualified provider eligible to enter into reimbursement contracts with state and local entities. The instant appeal thus poses precisely the question left open in *Kelly Kare*.[3]

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3 Our decision in *701 Pharmacy Corp. v. Perales*, 930 F.2d 163 (2d Cir. 1990), decided the same day as *Kelly Kare*, is not dispositive. In

A property interest in the continued receipt of a governmental benefit must rest on "a legitimate claim of entitlement." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Such an entitlement springs not from the Constitution itself but from " 'existing rules or understandings that stem from an independent source such as state law. . . .' " *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Board of Regents v. Roth*, *supra*, at 577). As we stated in *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577 (2d Cir. 1989):

> Where the state provisions bestow a right that cannot properly be eliminated except for cause, that right constitutes property protected by procedural due process. On the other hand, the existence of provisions that retain for the state significant discretionary authority over the bestowal or continuation

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701 Pharmacy Corp., we rejected an equal protection challenge to the uneven due process afforded "for cause" and "without cause" contract terminations. Appellants argued that the arbitrary nature of New York's *termination* provisions (under which a qualified provider may be terminated without cause and without an opportunity to submit a written request for reconsideration, *see* NYCRR Section 504.7(a)) could be demonstrated by comparing them to the *enrollment* provisions (under which even a first-time applicant denied enrollment has the right to request reconsideration, *see* NYCRR Section 504.5(e)(1)). While acknowledging the irony of affording first-time applicants for enrollment greater procedural rights than existing providers, we nevertheless upheld the procedural asymmetry as rational on the ground that "[i]n one year, the Department makes approximately 100 times the number of enrollment decisions as it does decisions to terminate under § 504.7(a)" and that "[t]he written reconsideration procedure is thus aimed at minimizing the greater risk of error associated with an enrollment determination." *701 Pharmacy Corp.*, 930 F.2d at 169. However, *701 Pharmacy Corp.* turned on equal protection rather than property issues and thus did not address the question posed by the instant appeal.

> of a government benefit suggests that the recipients of such benefits have no entitlement to them.

Id. at 581 (citations omitted).[4]

Citing Part 504, we observed in *Plaza Health* that "the combination of rights reserved by the State with regard to Medicaid providers, allowing DSS to terminate [contractual participation] without cause on 30 days' notice or to terminate or suspend immediately in certain circumstances, casts doubt on whether the provider's interest in continuing as a provider, either indefinitely or for any period without interruption, is a property right that is protected by due process." 878 F.2d at 582. *Kelly Kare* and *701 Pharmacy Corp.*, 930 F.2d 163 (2d Cir. 1991), *see supra* note 3, have since highlighted the substantial discretion state officials have in determining the qualifications and status of New York Medicaid providers. To be sure, neither *Kelly Kare* nor *701 Pharmacy Corp.* determined whether a provider was entitled to continued enrollment in the program, but each emphasized that officials have broad discretion in selecting providers. *Kelly Kare* upheld the State's right to terminate without cause specific reimbursement contracts—the indispensable item that makes one's status as a qualified provider economically significant. *701 Pharmacy Corp.* upheld such discretion against an equal protection challenge. When combined with the obvious

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4 Decisions prior to *Plaza Health*—*see Oberlander v. Perales*, 740 F.2d 116, 120 (2d Cir. 1984) (no property interest in the future rate of reimbursements); *Patchogue Nursing Center v. Bowen*, 797 F.2d 1137, 1144-45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987) (nursing home had a property right in continued participation in Medicaid but received adequate due process); *Case v. Weinberger*, 523 F.2d 602, 609-10 (2d Cir. 1975) (same)—offer little guidance on the question raised in the instant matter because they predate the reenrollment scheme of Part 504.

discretion conferred by the reenrollment provisions themselves, these decisions convince us that our doubts in *Plaza Health* were well-founded and that appellant has no property right to continued enrollment as a qualified provider. There is nothing in the status of qualified providers to suggest that such status is more of an entitlement than one's status as a party to a reimbursement contract. The discretion of New York Medicaid officials is similarly broad with respect to both, and there is therefore no reason to regard one as a property right but not the other.

We also reject appellant's contention that the reenrollment regulation is inconsistent with the enabling statute, which states that the Department shall issue regulations "establishing and maintaining standards for all non-institutional health care and services rendered pursuant to this title, including *but not limited to* procedural standards relating to the revocation, suspension, limitation or annulment of qualification for participation as a provider" for incompetency, failure to meet program standards or threatening public health or safety. N.Y. Soc. Serv. Law § 364(2)(b) (McKinney 1983) (emphasis added). That DSS must issue regulations governing the "for cause" termination of providers in no way precludes the Department from issuing other regulations reasonably necessary to advance the objectives of the program. We therefore find no merit to appellant's claim that the reenrollment procedure conflicts with the statutory scheme.

We now turn to appellant's deprivation of liberty claim. An essential element of a claim for damage to professional reputation is the publication of false information. *See Quinn v. Syracuse Model Neighborhood*

Corp., 613 F.2d 438, 446-47 (2d Cir. 1980). Appellant's complaint alleges that false information contained in the Department's correspondence was distributed to "other government agencies, the medical community, third party insurers and other persons." However, because appellant cited no specific instance of distribution, the district court granted appellees' motion to dismiss under Fed. R. Civ. P. 12(b)(6), stating:

> Even giving Senape the benefit of the doubt that this ambiguous paragraph in his Complaint sufficiently alleges that DSS has already published this information, DSS has submitted a sworn affidavit denying that it has done so. *See* Tapp. Aff. ¶ 33. Therefore, Senape has failed to create a genuine issue of material fact as to whether defendants have deprived him of a protected liberty interest.

Appellant does not challenge the district court's resort to matters outside the pleadings. Nor does he claim that, if given notice of the court's intention to do so as required by Fed. R. Civ. P. 12(b)(6), he would have submitted evidence indicating publication. Although he might well be entitled to such a remand, *see Gutwein v. Roche Laboratories*, 739 F.2d 93 (2d Cir. 1984) (remand where insufficient time allowed to respond to summary judgment motion and party represents that contradictory evidence could have been obtained if ten-day notice period of Fed. R. Civ. P. 56(c) had been observed), his present failure to claim that he has evidence of publication indicates to us that a remand would be futile.

Affirmed.